TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 234.

J. PIERPONT MORGAN, PLAINTIFF IN ERROR,

vs.

THOMAS STRUTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED MARCH 17, 1886.

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1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States in and for the western district of Pennsylvania, wherein J. Pierpont Morgan is plaintiff and Thomas Struthers, impleaded with Thomas S. Blair, is defendant, entered at No. 31 of May term, 1882, may be found the following words and figures, to wit:

Appearance Docket Entries.

May Term, 1882.

J. PIERPONT MORGAN, a Citizen of the State of New York,
vs.
THOMAS S. BLAIR and THOMAS STRUTHERS, Citizens of the State of Pennsylvania. } No. 31.

Thomas M. Marshall, Hampton & Dalzell.
S. P. Johnson, for Struthers; George Shiras, Jr.

Precipe for summons — case filed March 1, 1882. Same day, summons issued, returnable first Monday of March, 1882. 1882, March 2.—Summons served upon Thomas Struthers by leaving a true copy at his residence with an adult member of his family; *n. e. i.*, as to other defendant; mar., $2.50. 1882, April 17.—Rule to declare in one month or judgment *sec. reg.* issued. 1882, April 19.—Service of rule to declare accepted by Hampton & Dalzell, Esq'r's. 1882, May 24.—Judgment herein against plaintiff in default of a declaration *sec. reg.;* H. D. Gamble, clerk. 1882, May 27.—Rule granted on defendants to show cause why judgment herein should not be taken off; see No. 29. 1882, May 30.—Service of above rule ac-
2 cepted by S. P. Johnston, Esq. 1882, June 15.—Ordered that *non pros.* be taken off upon plaintiff's paying costs to this date and filing declaration within ten days. 1882, June 15.—Affidavit of plaintiff and declaration filed. 1882, June 26.—Time for filing affidavit of defence extended till August 15, 1882. 1882, August 14.—Affidavit of defence of Thomas Struthers filed. 1882, Dec. 16.—Rule to plead issued. 1882, Dec. 18.—Service of rule to plead accepted by George Shiras, Jr., Esq., for Struthers. 1883, January 6.—Plea of defendant Struthers filed. 1883, May term.—Trial continued. 1883, November term.—Trial continued. 1884, December 20.—Rule with interrogatories for commission to issue to Charles Dinsmoor to take depositions on part of defendants filed. December 31.—Exceptions by plaintiff to interrogatories by defendants filed. Same day, commission issued to commissioner named; see No. 30. 1885, Jan'y 21.—Argument had upon exceptions to interrogatories and same overruled, without prejudice, as per order filed; see No. 30. 1885, January 28.—Cross-interrogatories filed and transmitted to commissioner. 1885, March 2.—Rule with interrogatories for commission to issue to David Caldwell, at Tyrone, Pa., to take depositions on part of defendant filed; see No. 30. March 4.—Counsel having agreed, commission to David Caldwell, with interrogatories mailed. M'ch 5.—Deposition taken under commission issued to

Charles Dinsmoor rec'd and notice given counsel. March 9.—Depositions under commission to Caldwell rec'd and notice given counsel. M'ch 16.—Exceptions to deposition of Blair filed. April 8.—
3 Amendment to declaration herein filed by leave of court. April 16.—Rule, with interrogatories for commission on behalf of defendant, to issue to D. T. Caldwell, at Tyrone, filed. April 23.—Cross-interrogatories filed and commission issued. May 15.—Depositions before D. T. Caldwell received and notice given counsel. 1885, May term.—Trial continued. 1885, Nov'r 16.—Stipulation of counsel filed agreeing to use testimony of witnesses therein named, given on the trial of the suit of Myers *v.* Blair *et al.*, in supreme court of N. Y. 1881, Nov. 17.—Additional plea filed. Same day, case called for trial, jury sworn, and trial proceeded with. Nov'r 18.—Trial proceeds. Nov. 19.—Trial proceeds and verdict rendered for defendant. Same day, plaintiff'- and defendants' points filed. 1885, November 24.—Judgment upon the verdict.

H. D. GAMBLE, *Clerk.*

1885, Dec'r 12th.—Writ of error to U. S. Supreme Court allowed.
" " " Citation signed.
" " " Bill of exceptions filed and sealed.
" " " Bond on writ of error approved and filed.
" " 30.—Notes of testimony and charge of the court filed.
1886, February 17.—Assignments of error filed.

4 *Precipe for Summons.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

J. PIERPONT MORGAN, a Citizen of the State of New York,
vs.
THOMAS S. BLAIR and THOMAS STRUTHERS, Citizens of Pennsylvania.

Issue summons — case, returnable to 1st return day.
March 1, 1882.

THOS. M. MARSHALL,
HAMPTON & DALZELL,
Pl'ff's Att'ys.

To H. D. Gamble, Esq., clerk.

Indorsed: No. 31. May term, 1882. J. P. Morgan, &c., *vs.* Thos. S. Blair & Thos. Struthers. Precipe for summons. Filed March 1, 1882. Thos. M. Marshall, pl'ff's att'y.

5 *Summons.*

UNITED STATES,
Western District of Pennsylvania, } *sct:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

We command you that you summon Thomas S. Blair and Thomas Struthers, citizens of the State of Pennsylvania, late of your district,

if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburgh on the first Monday of March, 1882, to answer J. Pierpont Morgan, a citizen of the State of New York, in an action on the case, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 1st day of March, A. D., 1882, and in the 106 year of the Independence of the said United States.

[Seal U. S. C. C., W. D. Pa.]

H. D. GAMBLE, *Clerk.*

Indorsed: No. 30. May term, 1882. Circuit court of the United States. J. P. Morgan *vs.* Thomas S. Blair and Thomas Struthers. Summons. Thomas M. Marshall, atttorney for plaintiff.

March 2, 1882.—Served the within summons upon the within-named Thomas Struthers by leaving a true and attested copy at his residence, in Warren, Pa., with an adult member of his family.

JOHN HALL, *U. S. Marshal,*
Per M. R. ROUSE, *Deputy.*

Sworn & subscribed before me this 2d day of March, 1882.
SIMON STRONG, *J. P.*

March 6, 1882.—N. E. I., as to Thos. S. Blair.

JOHN HALL,
U. S. Marshal.

6 *Precipe for Appearance.*

Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
THOMAS S. BLAIR & THOMAS STRUTHERS. } No. 31.

And now, viz., March 8th, 1882, — hereby appear for Thomas Struthers, one of the above defendants, and request the clerk to file and enter the same of record.

Warren, March 8, 1882.

S. P. JOHNSTON,
Att'y for T. Struthers.

Indorsed: No. 31. May term, 1882. J. P. Morgan *v.* Blair & Struthers. Precipe for appearance. Filed March 10, 1882.

7 *Precipe for Rule to Declare.*

In the Circuit Court of the United States for the Western District of Penna. May Term, 1882.

J. P. MORGAN
vs.
THOS. S. BLAIR & THOS. STRUTHERS. } No. 31.

Now, to wit, April 17, 1882, rule on plaintiff to declare in one month after notice of judgment of *non pros. sec. reg.*

S. P. JOHNSTON,
Att'y for Struthers, D'f't.

Indorsed: No. 31. May term, 1882. J. P. Morgan *vs.* Thos. Struthers *et al.* Rule to declare. Filed April 17, 1882. Johnston.

8 *Rule to Declare.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
BLAIR & STRUTHERS. } No. 31.

And now, to wit, April 17, 1882, rule entered in the above-entitled case upon defendant to declare in one month or judgment *sec. reg.*

From the record.

[Seal U. S. Cir. C't, W. D. Pa.]

H. D. GAMBLE, *Clerk.*

Indorsed: No. 31. May term, 1882. Appearance docket. Circuit court of the United States, western district of Pennsylvania. Morgan *vs.* Blair & Struthers. Rule to declare. Ap. 19, 1882. Service accepted. Hampton & Dalzell, pl'ff'- att'ys.

9 *Affidavit of Claim.*

CITY OF NEW YORK,
County of New York, } *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
THOS. STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

J. J. Goodwin, agent in this behalf of J. Pierpont Morgan, pl'ff, being duly sworn according to law, deposes and says that the defendants above-named are justly and truly indebted to said J. Pierpont Morgan in the sum of twenty-six thousand two hundred —

eighty-two & $\frac{19}{100}$ dollars, being the amounts paid by said Morgan for four hundred shares (400) of the capital stock of the Blair Iron & Steel Company, a corporation organized under the laws of Pennsylvania, with seven per cent. interest per annum from the date of the payments by plaintiff made upon said stock.

Deponent attaches hereto and makes part hereof an exhibit marked A, showing the various payments made by the plaintiff on said stock and the dates thereof, and the calculations of interest on said payments, which he says is true and correct in every particular. Said indebtedness arose as follows: On April 4, 1873, the said defendant executed and delivered to said plaintiff a certain agreement in the words and figures following, viz:

10 Whereas J. Pierpont Morgan has purchased four hundred shares (400) of the stock of the Blair Iron and Steel Company at the price of fifty dollars per share and sold by A. S. Diven, trustee of said company:

Now, we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay to him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

New York, April 4, 1873.

THOS. S. BLAIR.
T. STRUTHERS.

In consideration of the foregoing agreement said plaintiff subscribed for and took and paid for four hundred shares of said company's stock, as shown by Exhibit A, aforesaid. Subsequently and at the time named therein said defendants executed and delivered to said plaintiff an agreement in the words and figures following, viz:

NEW YORK, *March* 22, 1875.

In consideration of the waiver by J. Pierpont Morgan of the right of election to sell to us the four hundred shares of stock in the Blair Iron & Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4th, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and

11 pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per year from the date of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of J. P. Morgan four hundred shares of the stock of the said Blair Iron and Steel Company, to be held by him in trust for that purpose.

THOMAS S. BLAIR.
THOMAS STRUTHERS.

Subsequently and at the time named therein the said plaintiff caused to be served upon said defendants a notice in the words and figures following, viz:

NEW YORK, *March* 20, 1876.

GENTLEMEN: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron & Steel Company held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan & J. W. Drexel, of April 4th, 1873, and the several renewals thereof.

You are hereby notified that I am ready to transfer the stock to you or to any person or persons whom you may designate upon the payment of the purchase-money thereof and seven per cent. interest thereon from date of payment.

I hereby tender you the certificates of stock and I demand fulfilment of your contract in the premises. I am ready and willing at any time to transfer the stock upon the books of the company and fully perform the conditions of rescission of purchase.

12 Respectfully, J. P. MORGAN.

To Messrs. Thos. S. Blair and T. Struthers.

Deponent further avers that on the 4th day of April, 1876, said plaintiff did, by his agent, duly constituted, tender to said defendants the transfers of stock in said foregoing papers referred to, and produced the certificates therefor—both the stock purchased and the stock held as collateral—and asked defendants to receive the same and to pay to deponent the price thereof and interest, as provided by the said agreements hereinbefore recited, which they absolutely refused to do.

That said Blair Iron and Steel Company is wholly insolvent, and that by reason of defendants' refusal to carry out their said contracts with the plaintiff he has suffered and is entitled to recover from them damages to the amount of $26,282.19, as hereinbefore stated.

That these allegations are made upon information and belief.

JAMES J. GOODWIN.

Sworn and subscribed before me this 25th day of May, 1882.

B. AYMAR SANDS,
Notary Public, N. Y. Co.

13 EXHIBIT No. 4. Nov. 17, '85, A. K.

Exhibit A.

Statement of payments made by J. P. Morgan on account of subscription to Blair Iron & Steel Co. stock under Blair & Struthers' guarantee.

1873.		
April 18		6,666 67
Oct. 15		2,000 00
1874.		
Feb'y 18		2,000 00
April 10		4,333 33
June 1		5,000 00
Interest on 6,666.67, April 18, 1873, to June 1st, 1874, 1 yr. 1 mo. and 12 days, at 7%	521 06	
Interest on $2,000, Oct. 15, 1873, to June 1, 1874, 7 months 16 days, at 7%	87 89	
Interest on $2,000, Feb'y 18, 1874, to June 1st, 1874, 3 months 10 days, at 7%	38 89	
Interest on $4,333.33, April 10, 1874, to June 1, 1874, 1 month 20 days, at 7%	42 12	
Interest on 20,000, June 1, 1874, to May 25, 1882, 7 years 11 months and 25 days, at 7%	5,592 23	
		6,282 19
Total		26,282 19

Indorsed: No. 31. May T., 1882. Affidavit of J. P. Morgan. Filed June 15, 1882.

14 *Declaration.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *ss:*

In the Circuit Court of the United States, Western District of Pennsylvania.

J. P. MORGAN *vs.* BLAIR & STRUTHERS.

Thomas Struthers, defendant, who was impleaded with Thomas S. Blair, citizens of the State of Pennsylvania, were summoned to answer J. P. Morgan, the plaintiff, citizen of the State of New York, of a plea of trespass on the case; whereupon said plaintiff, by Thomas M. Marshall and Hampton & Dalzell, his attorneys, complains of the said defendant:

For that whereas heretofore, to wit, on the 4th day of April, A. D. 1873, at New York, to wit, in the western district of Pennsylvania aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and pay for,

at the rate of $50.00 per share, four hundred shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, they, the said defendants, undertook and then and there faithfully promised the said plaintiff that if at the end of one year from said date he, the said plaintiff, should desire to sell the said shares at the said price by him paid
15 for the same they, the said defendants, would purchase the said shares of the said stock, to wit, four hundred shares of the said Blair Iron & Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per centum per annum.

And the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, take and pay for four hundred (400) shares of said stock aforesaid at the rate of $50.00 per share, amounting in all to a large sum, to wit, the sum of twenty thousand dollars ($20,000.00).

And the said plaintiff further avers that at divers times subsequently, to wit, on the 4th day of April, A. D. 1874, and, to wit, on the 4th day of April, A. D. 1875, in consideration that the said plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the said defendants the said shares of the capital stock of the said Blair Iron & Steel Company, to wit, four hundred (400) shares thereof, they, the said defendants, undertook and then and there promised faithfully the said plaintiff that if at the end of one year from the said last-mentioned dates, respectively, to wit, April 4th, A. D. 1874, in the first instance, and April 4th, A. D. 1875, lastly, he, the said plaintiff, should desire to sell the said hereinbefore mentioned shares at the said
16 price by him paid for the same, they, the said defendants, would purchase the said shares of the said stock at the said price by him, the said plaintiff, paid therefor, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per centum per annum. Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said stock was by the said plaintiff tendered to the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiff the said sum of twenty thousand dollars ($20,000), but have hitherto wholly neglected and refused, and do still refuse and neglect, to wit, at the western district of Pennsylvania, to the damage of the plaintiff thirty thousand dollars.

And the said plaintiff further complains of the said defendants, for that whereas heretofore, to wit, on the 4th day of April, A. D. 1876, to wit, at the western district of Pennsylvania, the said defendants bargained for and bought of the said plaintiffs at the special instance and request of the said defendants, and that said plaintiff then and there sold to the said defendants a large quantity of goods, to wit, four hundred (400) shares of the capital stock of the Blair

Iron and Steel Company at the rate or price of $50.00 per share, with seven per cent. interest added from April 4th, 1873, to be delivered by the said plaintiff to the said defendants, and to be paid for by the said defendants to the said plaintiff on the delivery
17 thereof as aforesaid and in consideration thereof, and that the plaintiff, at the like special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said stock to the said defendants in the time and at the place aforesaid, they, the said defendants, undertook and then and there faithfully promised the said plaintiff to accept the said stock of and from him, the said plaintiff, and to pay for the same on the delivery to them, the said defendants, as aforesaid.

And although the said plaintiff afterwards, to wit, on the day and year aforesaid, to wit, at the western district of Pennsylvania aforesaid, was ready and willing and then and there tendered and offered to deliver the said stock to the said defendants, and then and there requested the said defendants to accept the same and to pay him therefor as aforesaid, yet the said defendant-, not regarding their said promises and undertakings, but contriving and craftily and subtly intending to deceive and to defraud the said plaintiff in this behalf, did not nor would at the time when they were so requested as aforesaid or at any time before or afterwards accept the said stock or any part thereof of or from the said plaintiff or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do, to the damage of the plaintiff thirty thousand dollars ($30,000).

And whereas also the said defendants afterwards, to wit, at the district aforesaid, on the day and year aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars
18 ($20,000) for divers shares of the capital stock of the Blair Iron & Steel Company by the said plaintiff before that time bargained and sold to the said defendants at their special instance and request, and, being so indebted, they, the said defendatns, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the day and year aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars ($20,000) for so much money by the said defendants before that time had and received to and for the use of the said plaintiff, and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, in the day and year aforesaid, to wit, at the district aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars

($20,000.00) for so much money by the said plaintiff before that time paid, laid, and expended to and for the use and benefit of the said defendant-, at his like special instance and request, and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised
19 the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, were indebted to the said plaintiff in the sum of twenty thousand dollars ($20,000.00) for so much money by the said plaintiff before that time lent and advanced to the said defendants at their special instance and request, and, being so indebted, they, the said defendants, in consideration thereof, to wit, on the day and year aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested.

Nevertheless, the said defendants, not regarding their said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff, although they, the said defendants, afterwards, to wit, on the day and year last mentioned, to wit, at the district aforesaid, were requested by the said plaintiff so to do, but the said defendants to pay him the same have hitherto wholly neglected and refused and still do neglect and refuse, to the damage of the said plaintiff thirty thousand dollars ($30,000.00), and therefore he brings this suit.

THOS. M. MARSHALL,
HAMPTON & DALZELL,
Att'y- for Pl'ff.

Indorsed: No. 31. May T., 1882. J. P. Morgan *vs.* Blair & Struthers. Narr. Filed June 15, 1882.

20 *Affidavit of Defence.*

STATE OF PENNSYLVANIA, } ss:
Warren County, }

Circuit Court of the United States, Western District of Pennsylvania.
May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS S. BLAIR and THOMAS STRUTHERS. } No. 31.

Affidavit of defence of Thomas Struthers on his own behalf.

Thomas Struthers, being duly sworn, saith that he has a just and legal defence to the whole of plaintiff's declaration and affidavit of cause of action in this case, the nature and character of which is as follows:

First. The consideration mentioned in the agreement bearing date April 4, 1873, a copy of which is purported to be given in plaintiff's affidavit, on which this suit is brought, was never paid, nor was any valid consideration paid or given or agreed to be paid or given to defendants therefor, neither was there any such consideration for the agreement of 1874 referred to in plaintiff's affidavit, nor for the agreement of March 22, 1875, a copy of which is purported to be given in plaintiff's affidavit.

Second. That the agreement of April 4, 1873, out of which spring the extensions of 1874 and 1875, on the latter of which this suit is brought, is usurious, in that it constitutes a mere device for obtaining to said plaintiff more than the legal interest for money
21 by said plaintiff advanced and to be advanced to the Blair Iron and Steel Company.

On the advancement of fifty dollars ($50.00) per share by the plaintiff to the Blair Iron and Steel Company the agreement places in his hands four hundred (400) shares of the stock of the said company, with the privilege of determining at the end of a year whether he will hold the same as a purchase at that price or that the money advanced thereon as a loan at seven per cent. interest, and hold said shares as security for the repayment of the money and interest thereon at the end of the year; and to insure the certain repayment of said money so advanced and interest thereon at said rate of seven per cent. per annum in case said plaintiff shall, in the exercise of his right of election, determine it a loan, it makes the defendants obligors for the repayment of the same, with the stipulated seven per cent. interest thereon. Said stock might and was expected to yield and pay dividends within the year and to appreciate largely in value, and the chance was thus secured to the plaintiff of realizing to himself by such dividends and by continuing to hold the shares as investment by sale thereof at greatly improved and enlarged prices a much larger compensation than seven per cent. for the money so advanced.

The said plaintiff, having elected to treat the advancement as a loan, thereby subjects himself to the laws of the State of New York, where said agreement was made in respect to the loan of money.

This form of agreement was used as a proper mode of getting the stock into the hands of the plaintiff, to be held absolutely, if he should so elect, or to be held as security collateral to the obli-
22 gation of said Blair and Struthers for the return or repayment of the money so advanced, with seven per cent. interest, in case he should elect to determine it a loan; and, securing as it purports to do the certain return to the plaintiff of the money so advanced and made a loan by his election, with the highest rate of interest allowed by the laws of said State of New York, and in addition thereto the chance and probability of a much larger sum than the principal sum and legal interest thereon, said agreement is in contravention of said laws of the State of New York and usurious and void, as this affiant is advised and believes.

Third. The plaintiff did not tender to this defendant, by proper transfer and delivery, on the 4th day of April, 1876, the four hun-

dred shares of stock mentioned and referred to in plaintiff's affidavit; neither did he tender to this defendant, by proper transfer and delivery, on the 4th day of April, 1876, the four hundred shares of stock mentioned and referred to in plaintiff's affidavit as being held as collateral security, and, to the best of his information and belief, no such tender was made to Thomas S. Blair at that time.

THOMAS STRUTHERS.

Sworn and subscribed before me this 14th day of August, 1882.

H. D. GAMBLE,
Clerk U. S. Cir. Court, W. D. of Pa.

Indorsed: No. 31. May term, 1882. J. Pierpont Morgan *vs.* Thomas S. Blair & Thomas Struthers. Affidavit of defence by Thomas Struthers, in his own behalf. Filed Aug. 14, 1882.

23 *Rule to Plead.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

MORGAN *vs.* BLAIR & STRUTHERS. } No. 31.

And now, to wit, Dec'r 16, 1882, rule entered in the above-entitled case upon defendant, Thomas Struthers, to plead in one month or judgment *sec. reg.*

From the record.

[SEAL.] H. D. GAMBLE, *Clerk.*

Indorsed: No. 31. May term, 1882. Appearance docket, circuit court of the United States, western district of Pennsylvania. Morgan *vs.* Blair & Struthers. Rule to plead. Service accepted Dec'r 18, 1882. Geo. Shiras, Jr., att'y for Struthers.

24 *Pleas.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN *vs.* BLAIR & STRUTHERS. } No. 31.

And the said Thomas Struthers, by his attorneys, comes and defends the wrong and injury, when, etc., and says he did not undertake or promise in manner and form as the said J. P. Morgan hath in his declaration thereof complained against him, the said Thomas Struthers, and of this he, the said Thomas Struthers, puts himself upon the country.

And, for a further plea in this behalf as to all the counts of the

said declaration, the said Thomas Struthers, by leave of the court here for this purpose first had and obtained, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says the consideration mentioned in the alleged agreement referred to in plaintiff's declaration bearing date April 4, 1873, was never paid, nor was any valid consideration paid or given or agreed to be paid or given to defendants therefor, neither was there any valid consideration paid or given or agreed to be paid or given for the alleged agreement of 1874, referred to in plaintiff's declaration, nor for the alleged agreement of March 22d, 1875, referred to in said declaration, and a copy of which is purported to be given in plaintiff's affidavit of claim, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said J. P. Morgan ought to have
25 or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country.

And, for a further plea in this behalf to all the counts of the said declaration, the said Thomas Struthers, by like leave of the court here for this purpose first had and obtained, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says that heretofore, to wit, on the 4th day of April, A. D. 1873, in the city of New York and State of New York, it was corruptly and against the statute in such case made and provided agreed by and between the said plaintiff and the said defendants as stated in the alleged agreement of that date, a copy of which is set forth in the plaintiff's affidavit of claim, and out of which spring the alleged agreements of 1874 and 1875, and said alleged agreement was usurious, in that it constituted a mere device or contrivance for obtaining — the said plaintiff more than the legal interest for money by the said plaintiff advanced or to be advanced to the Blair Iron and Steel Company.

On the advancement of fifty dollars per share by the plaintiff to the Blair Iron & Steel Company the alleged agreement places in his hands four hundred shares of the stock of the said company, with the privilege of determining at the end of a year whether he will hold the same as a purchase at that price or treat the money advanced thereon as a loan at seven per cent. per — interest, and hold said shares as security for the repayment of the money so advanced, and interest thereon, at the end of the year; and to insure the
26 certain repayment of said money so advanced and interest thereon at the said rate of seven per cent. per annum, in case said plaintiff shall, in the exercise of his right of election, determine it a loan, it makes the defendants obligors for the repayment of the same, with seven per cent. interest thereon. Said stock might and was expected to yield and pay dividends within the year and to appreciate largely in value, and the chance was thus secured to the plaintiff of realizing to himself by such dividends and by continuing to hold the shares as an investment or by sale thereof at greatly improved and enlarged prices a much larger compensation than seven per cent. for the money so advanced. The said plaintiff, hav-

ing elected to treat the advancement as a loan, thereby subjects himself to the laws of the State of New York, where said alleged agreement was made, in respect to the loan of money. This form of agreement was used as a proper mode of getting the stock into the hands of the plaintiff, to be held absolutely, if he should so select, or to be held as security collateral to the obligation of said Blair & Struthers for the return or repayment of the money so advanced, with seven per cent. interest, in case he should elect to determine it a loan: and securing, as it purports to do, the certain return to the plaintiff of the money so advanced and made a loan by his election, with the highest rate of interest allowed by the laws of the said State of New York, and in addition thereto the chance and probability of a much larger sum than the principal sum and legal interest thereon, said alleged agreement is in contravention of said laws of the
27 said State of New York and usurious and void, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said J. P. Morgan ought to have or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country.

And, for a further plea in this behalf as to all the counts in the said declaration, the said Thomas Struthers, by like leave of the court here for this purpose first had and received, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says the plaintiff did not tender to the said defendants or either of them, by proper transfer or delivery, on the 4th day of April, 1876, the four hundred shares of stock referred to in plaintiff's declaration, neither did he tender to the defendants or either of them, by proper transfer and delivery, on the fourth day of April, 1876, the four hundred shares of said stock referred to in plaintiff's declaration as being held as collateral security, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said J. P. Morgan ought to have or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country.

And, for a further plea in this behalf as to all the counts of the said declaration, the said Thomas Struthers, by leave of the court for this purpose first had and obtained, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says that the said alleged agreement of April 4th, 1873, referred to in said declaration, out of which the said alleged agreements of 1874 and 1875 arise, is against public policy
28 and good morals and a fraud upon the subscribers or purchasers of other portions of said six thousand shares of the stock of the Blair Iron and Steel Company so offered for sale by A. S. Diven, trustee for said company, in that it gave the said J. P. Morgan, while acting with the other subscribers or purchasers of the said stock of the Blair Iron and Steel Company, being a matter in which they had a common interest, the chance or means of securing to himself a profit or advantage over said other subscribers or purchasers by a secret or undisclosed agreement, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment

if the said J. P. Morgan ought to have or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country.

And, for a further plea in this behalf as to all the counts of the said declaration, the said Thomas Struthers, by leave of the court here for this purpose first had and obtained, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says that the alleged agreement of April 4th, 1873, referred to in the plaintiff's declaration, with the power therein provided to elect to determine it a loan, as he subsequently did by the exercise of said power, constitutes a loan of the money to the Blair Iron and Steel Company with a pledge of the stock as collateral security for said loan, with Blair & Struthers as guarantors. The consideration mentioned in the said alleged agreement was never paid to defendants or either of them for this their said guaranty,
29 and it is therefore void, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said J. P. Morgan ought to have or maintain his aforesaid action thereof against him, &c., and of this the said Thomas Struthers puts himself upon the country, etc.

And, for a further plea in this behalf as to all the counts of the said declaration, the said Thomas Struthers, by leave of the court here for this purpose first had and obtained, says that the said J. P. Morgan ought not to have or maintain his aforesaid action thereof against him, because he says that the said cause or several causes of action in the declaration mentioned did not, nor did any or either of them, accrue to the plaintiff at any time within six years next before the commencement of this suit, and this the said Thomas Struthers is ready to verify; wherefore he prays judgment if the said J. P. Morgan ought to have or maintain his aforesaid action thereof against him, etc., and of this the said Thomas Struthers puts himself upon the country, etc.

GEORGE SHIRAS, JR.,
JOHNSTON LINDSEY & PARMLEE &
BROWN & STONE,
Attorneys for Thomas Struthers.

(Indorsed:) No. 31. May term, 1882. J. P. Morgan *vs.* Blair and Struthers. Circuit court of U. S. Pleas. Filed Jan'y 6, 1883.

30 *Additional Counts to Declaration.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
THOMAS STRUTHERS, Impleaded with THOMAS S. BLAIR. } No. 31.

And now, to wit, ——, 1885, comes John Dalzell, of counsel for plaintiff, and files the following additional counts to the declaration in this case, to wit:

And the said plaintiff further complains of the said defendants, for that whereas heretofore, to wit, on the 4th day of April, 1873, at New York, to wit, in the western district of Pennsylvania, they, the said defendants, by an agreement in writing, for the consideration of one dollar, therein expressed, undertook and then and there faithfully promised the said plaintiff that if at the end of one year from said date he, the said plaintiff, should desire to sell four hundred shares of the stock of the Blair Iron and Steel Company at the price of fifty dollars per share they, the said defendants, would purchase the said shares of stock, to wit, four hundred (400) shares of the stock of the said Blair Iron & Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per centum per annum.

And the said plaintiff further avers that subsequently, to wit, on the 4th day of April, A. D. 1874, to wit, on the day of the expiration of the above-mentioned agreement, said defendants entered into another similar agreement in writing, for a like consideration therein expressed, to wit, the sum of one dollar, whereby
31 they agreed to purchase the said shares of stock from the plaintiff for the price of fifty dollars per share, with interest at the rate of seven per cent. per annum, at the end of one year from April 4th, 1874, if the plaintiff should so elect.

And the said plaintiff further avers that subsequently, to wit, on the 22d day of March, 1875, in consideration that the plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the said defendants the said shares of the capital stock of the said Blair Iron and Steel Company, to wit, four hundred shares thereof, they, the said defendants, undertook and then and there promised faithfully to the said plaintiff, by an agreement in writing, that if at the end of one year from the expiration of said last-mentioned agreement, to wit, at the end of one year from April 4th, 1875, he, the said plaintiff, should desire to sell the hereinbefore-mentioned shares at the said price by him paid for the same they, the said defendants, would purchase the said shares of the said stock at the price paid by the plaintiff for the same, with interest at the rate of seven per cent. per annum from the dates of the payment by the plaintiff of the respective installments on said stock.

Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said plaintiff notified said defendants of his, said plaintiff's, election to sell the said stock at and for the price aforesaid, and although the said stock was by the said plaintiff tendered to the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiff the said sum of twenty thousand dollars, with interest thereon as aforesaid, but have wholly neglected and refused and do still refuse and neglect
32 so to do, to wit, at the western district of Pennsylvania, to the damage of the plaintiff forty thousand dollars, and therefore he brings suit.

And the said plaintiff further complains of the said defendants, for that whereas heretofore, to wit, on the 4th day of April, A. D. 1873, at New York, to wit, in the western district of Pennsylvania, they, the said defendants, by an agreement in writing, for the consideration of one dollar, therein expressed, undertook and then and there faithfully promised the said plaintiff that if at the end of one year from said date he, the said plaintiff, should desire to sell four hundred shares of the stock of the Blair Iron & Steel Company at the price of fifty dollars per share they, the said defendants, would purchase the said shares of stock, to wit, four hundred (400) shares of the stock of the said Blair Iron & Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per cent. per annum.

And the said plaintiff further avers that subsequently, to wit, on the 4th day of April, A. D. 1874, to wit, on the day of the expiration of the above-mentioned agreement, said defendants entered into another similar agreement in writing, for a like consideration therein expressed, to wit, the sum of one dollar, whereby they agreed to purchase the said shares of stock from the plaintiff for the price of fifty dollars per share, with interest at the rate of seven per cent. per annum, at the end of one year from April 4th, 1874, if the plaintiff should so elect.

And the said plaintiff further avers that subsequently, to wit, on the twenty-second day of March, 1875, in consideration that
33 the plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the defendants the said shares of the capital stock of the said Blair Iron & Steel Company, to wit, four hundred (400) shares thereof, they, the said defendants, undertook and then and there promised faithfully to the said plaintiff, by an agreement in writing, that if at the end of one year from the expiration of said last-mentioned agreement, to wit, at the end of one year from April 4th, 1875, he, the said plaintiff, should desire to sell the hereinbefore-mentioned shares at the said price by him paid for the same they, the said defendants, would purchase the said shares of the said stock at the price paid by the plaintiff for the same, with interest at the rate of seven per cent. per annum from the dates of the payments by the plaintiff of the respective instalments on said stock. Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said plaintiff notified said defendants of his, said plaintiff's, election to sell the said stock at and for the price aforesaid, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiff the said sum of twenty thousand dollars, with interest thereon as aforesaid, but have wholly neglected and refused and do still refuse and neglect so to do, to wit, at the western district of Pennsylvania, to the damage of the plaintiff forty thousand dollars, and therefore he brings suit.

And now, to wit, April 8, 1885, on motion of John Dalzell, Esq., of counsel for plaintiff, leave is granted to amend the *narr.* in this

case by adding the within counts, and the same are ordered to be filed.

By the court.

Indorsed: Additional counts to declaration. Filed April 8, 1885.

34 *Additional Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

J. P. MORGAN
vs.
THOMAS STRUTHERS. } No. 31.

And, for further plea in this behalf to the original and additional counts filed by said plaintiff the said defendant, by his said attorneys, say- that, by reason of anything contained in said counts, the said plaintiff ought not to have or maintain his said action against him, because, he says—

That the four hundred shares of stock referred to in the said counts as having been purchased on the 4th day of April, 1873, by the plaintiff from A. S. Diven, trustee, had not been subscribed for or purchased at the time of the delivery and execution of said agreement of April 4th, 1873, but that, on the contrary, the subscription for and purchase of said stock and the execution and delivery of said agreement were simultaneous acts, and the making and delivery of said agreement constituted the consideration of said subscription and purchase.

And the said defendant alleges that the said agreement of subscription and purchase was in writing, in the words and figures following, to wit:

NEW YORK, *January* 20, 1873.

The capital stock of the Blair Iron and Steel Company is 25,000 shares of $100 each—$2,500,000. This capital has been paid up by the transfer of the patents for the Blair process and the works
35 at Glenwood, twenty-third ward of Pittsburgh, Pa., to the company (the deed for the Glenwood property to be made as soon as any empowering act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure), and the whole stock of said company issued to us in payment therefor.

We have agreed to place in the hands of General A. S. Diven, as trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, excepting $50,000.00 of the proceeds thereof first to be paid to us by said trustees. The trustees of the company have, with our consent, ordered the sale of six thousand of said shares for the purpose of raising a present working capital and paying said $50,000, the minimum price to be $50 per share; and said trustees, with the approbation of the board of trustees, now offers said 6,000 shares at said minimum price of $50 per share, to be paid for as follows, viz:

One-third part thereof as soon as the whole 6,000 shares shall be subscribed for, and the remainder in such instalments as the board of trustees may call for the same for the purposes of the business, the certificates to be delivered when the whole shall be paid.

THOMAS S. BLAIR.
T. STRUTHERS.
MORRISON FOSTER,
By his attorney, T. STRUTHERS.

We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth, but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed.

36	GEO. TALBOT OLYPHANT,	Four hundred shares.
	THOS. DICKSON,	Four hundred shares.
	A. S. DIVEN,	Four hundred shares.
	J. PIERPONT MORGAN,	Five hundred shares.
	JOS. W. DREXEL,	Five hundred shares.
	C. MEYER,	Six hundred shares.
	CHARLES G. FRANKLYN,	Two hundred and fifty shares.
	CHARLES H. DABNEY, by JAMES J. GOODWIN,	One hundred shares.
	EDW. C. GARDNER, *Att'y*,	Two hundred shares.
	EMIL HEINEMANN,	Two hundred shares.
	W. J. SYMS,	One hundred and fifty shares.
	THOMAS ALLEN, per power of attorney,	
	H. G. MARQUAND,	Two hundred shares.
	GOUVERNEUR MORRIS, JR.,	Fifty shares.
	RUTHERFORD STUYVESANT,	Two hundred shares.
	LEN. SMITH.	Fifty shares.

And this defendant alleges further that there were two other subscription papers, besides that of which the foregoing is a copy, of the same terms and tenor as the said copy, and that there were three subscribers to said two other subscription papers, which three subscribers, taken together, subscribed to eighteen hundred shares of the capital stock, thus making up the entire six thousand shares of stock above-mentioned; and this defendant alleges further, on information and belief, as follows: That the said defendant and Thomas S. Blair were the principal projectors and promoters of the enterprise and scheme of manufacturing steel by the process known as the Blair process (the said Blair being the author and inventor of that process), and were so known to the plaintiff at the time of the execution and delivery of the agreement, and at the same time were the principal projectors and promoters of the scheme for securing the
37 subscription for said six thousand shares, and were known to the plaintiff as such at that time, and were also at that time, and were known by the plaintiff to be at that time, the owners, to-

gether with Morrison Foster, above-named, of all or nearly all the capital stock of said company, excepting the 9,000 shares placed in the hands of A. S. Diven, as trustee.

And this defendant alleges further that the agreement of April 4th, 1873, set forth in the said count, was demanded by the plaintiff as a condition of the alleged purchase of and his subscription for said four hundred shares, and was executed by the said defendant and delivered to the plaintiff and accepted by him privately and without the consent or knowledge of parties who signed the said subscription for 6,000 shares after the plaintiff, and also without the consent or knowledge of parties who signed the said subscription before the plaintiff, and the said defendant therefore avers that said agreement is null and void as against public policy, and as a fraud upon such other subscribers; and this the said defendant is ready to verify; wherefore the defendant prays judgment, &c.

R. BROWN,
GEORGE SHIRAS, JR.,
WM. LINDSAY,
Att'ys for D'f'nt.

Indorsed: No. 31. May term, 1883. In the circuit court U. S. J. P. Morgan *vs.* Thomas Struthers. And now, to wit, Nov'r 17th, 1885, defendant has leave to file the within plea. Filed by leave of court this Nov. 17, 1885. H. D. Gamble, clerk. Brown & Lindsay & Shiras.

38 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
THOMAS STRUTHERS. } No. 31.

And now, Nov'r 17, 1885, the parties to this cause being at issue, and a jury being called, came, viz., J. S. Robinson, Martin Carey, John Grayson, H. H. Bengough, Nathan Winegart, Ezra Irwin, John Q. A. Sterrett, M. A. Spriggs, S. S. Bailey, J. R. Chambers, Joseph Shannon, and G. W. Bowers, and having been duly empanneled and sworn to well and truly try this issue joined between the plaintiff and defendant and a true verdict render according to the evidence, &c., whereupon the plaintiff's case is opened by his counsel and evidence offered, closing at the hour of 3 p. m., when defendant's case is opened by his counsel and evidence offered on his part, continuing until Nov. 19, at 10.30 a. m., at which time plaintiff offers his rebutting testimony, closing the evidence in the case at 11 a. m. Thereupon counsel for the respective parties addresses the jury, and at 12.30 the court charges the jury, who, at 1.10 p. m., retire to consult, and after due deliberation they return and say, we find for the defendant.

1885, November 24.—Judgment upon the verdict.

H. D. GAMBLE, *Clerk.*

39 *Plaintiff's Points & Answers.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

MORGAN *vs.* STRUTHERS.

1. If the jury find from the evidence that the defendant, Struthers, executed and delivered to the plaintiff the paper in evidence of date April 4th, 1873, and also the subsequent paper of date March 25th, 1875, and that on April 4th, 1876, plaintiff notified said defendant of his (said plaintiff's) election to sell to the defendant the stock in said papers mentioned and made tender thereof, and that the defendant refused to accept said stock and pay therefor, then this verdict should be for the plaintiff for the amount by him paid for said stock, as shown by the evidence, with interest thereon as in said original paper specified.

This point is affirmed, but subject to the effect of the proof introduced by the def't touching the exceptional engagement made by Struthers & Blair for the purchase of the stock subscribed for by the pl'ff.

W. McK.

2. If the jury find from the evidence that stock purchased by the plaintiff was stock originally issued by the Blair Iron & Steel Co. to the defendant Struthers and Thomas S. Blair and Morrison
40 Foster as full-paid stock, and that these parties, owners thereof, voluntarily agreed that the same, together with other like stock owned by them, should be sold at a minimum price by them named, in part for the benefit of the Blair Iron & Steel Co. and in part for their own benefit, and transferred said stock to a trustee to be by him so sold and accounted for, and that the said stock was so sold by said trustees, then, if the jury find also the facts as set out in the first point, the plaintiff is entitled to recover, whether the said stock was sold to all purchasers who paid the minimum price upon the same terms or not.

Refused.

W. McK.

3. That if the defendants, Struthers and Blair, in consideration that the plaintiff would purchase certain of the stock owned by them and Morrison Foster jointly (and by them voluntarily contributed, to be sold by trustee for the mutual benefit of themselves and the Blair Iron & Steel Company), agreed with the plaintiff to repurchase from him, at his option, within a time named, the stock by him bought from said trustee, said agreement is binding on them, even though no similar agreement was made with other purchasers of said stock from said trustee.

Refused.

W. McK.

4. That there is no evidence in this case that the making of the obligations sued — was concealed by the defendants from purchasers of the six thousand shares, or of any portion thereof, of the
41 stock sold by A. S. Diven, trustee.
Refused.

W. McK.

5th. That there is no evidence in this case that any of the stockholders in the Blair Iron & Steel Co. were in any way defrauded by reason of the execution and delivery of the writings sued upon and in evidence; or that any of said stockholders claims to have been so defrauded.
Refused.

W. McK.

6. That the execution and delivery to plaintiff of the obligations sued on as a consideration for plaintiff's purchase of four hundred shares of the said stock of the Blair Iron & Steel Co. from A. S. Diven, trustee, was not, under the evidence, a fraud in fact, and was not a fraud in law.
Refused.

W. McK.

7. That unless the jury find from the evidence that the obligations sued on were purposely concealed from the other purchasers of stock from A. S. Diven, trustee, or that any such purchaser desiring a similar obligation was refused the same, they should find for the plaintiff, if they find from the evidence that notice was given and tender made to the defendant Struthers on April 4th, 1876, as required by said obligations.
Refused.

W. McK.

Plaintiff's counsel except to answers to all the foregoing points and to the charge.

W. McKENNAN, *Cir. J.*

Indorsed: Plaintiff's points & answers thereto. Filed Nov'r 19, 1885. H. D. Gamble, cl'k.

42 *Defendant's Points & Answers.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. P. MORGAN
vs.
THOMAS STRUTHERS. } No. 31.

1st. The court is requested to charge that the agreement of April 4th, 1873, and the subscription to the stock, if found by the jury to have been simultaneous acts, constitute in law one contract, and

that the terms of said contract, taken together with the evidence of Wallace and of those portions of the pl'ff's affidavit of claim put in evidence showing a demand for interest on each instalment from the time of their respective payments, disclose the case of a usurious loan, and plaintiff cannot recover.

Refused.

W. McK.

Def't's counsel except to this answer.

W. McK., *Cir. J.*

2nd. That if they find that the agreement sued on of April 4th, 1873, was demanded and obtained by the plaintiff from Struthers & Blair as a condition upon which the plaintiff subscribed for and purchased 410 shares of stock of the Blair Iron & Steel Company; that the plaintiff was one of a number of persons who were asked to subscribe and did subscribe for stock in said company to the amount in the aggregate of 6,000 shares upon the same terms and conditions as set forth in the prospectus and contract of subscription, and
43 that others of said subscribers were not informed of the fact that plaintiff had obtained said agreement of April 4th, 1873, as a condition or part of his agreement to subscribe the said stock, and that the existence of such accompanying agreement was not made known to other of said common subscribers, then said agreement of April 4th, 1873, was in the eye of the law a fraud upon the other subscribers who did not receive and were not informed of the existence of such agreement, and was contrary to the policy of the law, and the plaintiff cannot recover.

Affirmed.

W. McK.

Indorsed: No. 31. May term, 1882. J. P. Morgan *vs.* T. Struthers. Defendant's points and answers thereto. Filed Nov'r 19, 1885. H. D. Gamble, clerk.

44 *Charge of the Court.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

(Oral charge of the court.)

GENTLEMEN OF THE JURY: The plaintiff seeks in this suit to recover upon an agreement entered into by the defendant, Thomas Struthers, and another, on the 4th of April, 1873, whereby they agreed to repurchase from the plaintiff 400 shares of stock in the Blair Iron & Steel Company, which had been subscribed for by him, at the end of a year if he desired then to relieve himself from the ownership of that stock. Standing by itself, there can be no

doubt that this arrangement was a perfectly honest and fair one. There is no vice inherent in such a contract that would relieve the person making it from its obligation, and if that were all that were in the case your duty would be a very simple and easy one. At the expiration of the year this arrangement was renewed and extended for another year—to the 4th of April, 1875—and at the end of that year it was renewed and extended again until April 4th, 1876, when Mr. Morgan, desiring to avail himself of the terms of the arrangement, gave notice to Mr. Struthers and tendered him the stock referred to in the agreement, so that it would seem
45 that Mr. Morgan not only made a fair contract with Mr. Struthers touching the purchase of this stock, but that he did all that the contract required of him to entitle him to demand the fulfilment of it on the part of Mr. Struthers. I therefore affirm the first point presented by the counsel of plaintiff, which is as follows:

"If the jury find from the evidence that the defendant, Struthers, executed and delivered to the plaintiff the paper in evidence of date April 4th, 1873, and also the subsequent paper of date March 25th, 1875, and that on April 4th, 1876, plaintiff notified said defendant of his (the plaintiff's) election to sell to the defendant the stock in said papers mentioned and made tender thereof, and the defendant refused to accept said stock and pay therefor, then their verdict should be for the plaintiff for the amount by him paid for said stock, as is shown by the evidence, with interest thereon, as in said original papers specified." I say I affirm this point, but subject to the effect of the proof introduced by the defendant touching the exceptional arrangement made by Struthers and Blair for the purchase of the stock subscribed for by the plaintiff. So that, taking the plaintiff's case by itself, considering alone the proofs offered by him, he has made out a case which would entitle him to your verdict.

This contract grew out of negotiations for the purchase of stock in the Blair Iron & Steel Company which had been placed in the hands of Mr. Divin, as trustee, for sale. He was to sell six thousand shares to raise 300,000 — for the owners of the stock who were offer-
46 ing it, and as a working capital for this iron & steel company. All this appeared in the paper which was drawn up (or prospectus, as it is called) by the persons who were interested in the sale of this stock and who were inviting subscriptions on the part of the expected purchasers of it. That paper also *ob*tained the terms upon which these subscriptions were asked and contained provisions as to appropriations of the money when it was realized by the sale of the stock. It is provided in it that 6,000 shares of stock shall be offered for the purpose stated, and that no subscription shall be binding upon any one of the subscribers until the 6,000 shares are reliably subscribed. Now, it might be apparent from the very nature of the enterprise in which the purchasers of this stock were invited to embark, but it is entirely clear from the terms of the paper itself that each man who subscribed a share of stock, or 100 shares, was to be put into the same boat with every other one, and they were all to stand upon an equality as to the terms of the sub-

scription. That was the offer; that was the invitation given by Struthers & Blair and the others who proposed to sell this stock, and that was the assurance which the law presumes was given to every one and upon which every one relied who put his name to this paper—that the terms were set forth in it which all were to have alike—in other words, they were to stand upon the same footing as to their purchase of stock.

Now, it is alleged that discrimination was made in favor of some and not in favor of others of the subscribers to this stock.
47 Is that true? The burden on the defendant undoubtedly is to satisfy you that it is; that all the subscribers to that stock received a paper similar to that which was given to the plaintiff in this case, and upon which this suit rests. Such an arrangement, if it was not made with all, or if it was not known to all, and all had not an opportunity to avail themselves of it, it is obvious, was exceptional, and it is obvious, too, that it was beneficial to those in whose favor it was made. Each man who subscribed to shares of stock in that corporation stood for the value of his investment upon the success of the enterprise itself. That was the only security he had for the return of his money, either in the form of dividends or so far as the safety of the capital was concerned. Mr. Morgan had not only that security, but he had the personal contract of Messrs. Blair and Struthers to give him back all his money with interest from the date of his subscription or payment of the money, if he so chose; so that evidently he did not stand in the same footing with others who did not receive similar papers as to the value of the security for the investment made. Now, under these circumstances—that is to say, if this arrangement for the repurchase of the stock was not known to all of the subscribers to that paper, and they were not permitted an opportunity to place themselves upon the same footing with all the other subscribers—it was an arrangement exceptionally beneficial to those in whose favor it was made, and prejudicial to those with whom it was not made, in so far as the value of the investment made by them was concerned; and that
48 is the reason why the law ordains that good faith requires that all persons who engage in a common venture or a common enterprise have a right to claim that they shall be placed on the same footing, or at least that they shall have an opportunity, by being informed of any other arrangement than such as appears on the face of the paper, to place themselves upon an equality as to the security of the investment which they make, and that is the reason why such breach of faith is visited by the law with an abrogation of such special arrangement made in favor of some and not of others of the subscribers to a common enterprise. So, gentlemen of the jury, I instruct you that this case, leaving everything else out of it, turns upon the sufficiency of the proof, in your judgment, as to whether some and not all of the subscribers to this stock were benefited by the arrangement which was made by Mr. Morgan, the plaintiff. I will not refer in detail to the evidence upon this point, because you remember it and it has been fully discussed by counsel; but, as to one of the subscribers to the stock,

whatever may be the statements of Mr. Blair and Mr. Struthers as to their impressions, you will remember the testimony of Gouverneur Morris, who certainly knows best as to what was done in his case (and if he is a credible man his testimony in regard to it is entitled to more weight than that of anybody else, whether positively stated or stated by mere impression), that he never heard of this arrangement until a few weeks before the trial of the case in which he was called as a witness, in New York, which was last year, I
49 think; and you will recall the testimony as to others; I need not refer to it. If you find that such a special and exceptional arrangement made with Mr. Morgan was not made known to all the subscribers to the stock Mr. Morgan had no right to make it and the law will not enforce it. So I say again as you find the facts with regard to that so you will find whether this arrangement is enforcible or not. I repeat, if you find that it was not made known to all of the subscribers to that stock it can avail Mr. Morgan nothing, and cannot be enforced as he seeks to enforce it now. As to the other points presented by the counsel of the plaintiff, I need not read them, but I have noted a refusal to all of them.

The counsel for defendant have presented two points:

"First. That the agreement of the 4th of April, 1873, and the subscriptions to the stock, if found by the jury to have been simultaneous acts, constituted in law one contract, and that the terms of said contract, taken together with the evidence of Wallace and all those portions of the plaintiff's affidavit of claim put in evidence, showing the demand for interest on each instalment from the time of their respective payments, disclose the case of a usurious loan, and plaintiffs cannot recover."

I decline so to instruct you. I am unable to see any feature of a usurious contract in this case, and therefore I decline to instruct you that if the facts stated in the point — to be true the contract is usurious and therefore not binding.

50 "Second. That if they find that the agreement sued on of April 4th, 1873, was demanded and obtained by the plaintiff for Struthers and Blair as a condition upon which the plaintiff subscribed for and purchased 400 shares of stock of the Blair Iron and Steel Company; that the plaintiff was one of a number of persons who were called for to subscribe and did subscribe for stock in said company to the amount in the aggregate of 6,000 shares, upon the same terms and conditions set forth in the prospectus and contract of subscription, and that others of said subscribers were not informed of the fact that plaintiff had obtained said agreement of April 4th, 1873, as a condition or part of this agreement to subscribe for said stock, and that the existence of such an accompanying agreement was not made known to the other of said common subscribers, then said agreement of April 4th, 1873, was, in the eye of the law, a fraud upon the other subscribers who did not receive and were not informed of the existence of said agreement, and was contrary to the policy of the law, and the plaintiff cannot recover."

This point is affirmed, and I so instruct you. Now, in order that there may be no misapprehension about your duty in this case, I

repeat what I have said (and whatever may be our own views as to the honesty of such an attempt to defeat the enforcement of an honest contract, that is a consideration which you or I have
51 nothing to do with), if you find that the beneficial arrangement set up and sought to be enforced in this suit was not made known to all the subscribers to that stock and they were not afforded an opportunity to avail themselves of like security, as matter of law that arrangement was void and cannot be enforced, and that is the simple question which I submit to you in this case. If you find that there were any of the subscribers of that stock who were left out and were not afforded the security that Mr. Morgan obtained, the latter cannot avail himself of this arrangement, and your verdict should be for the defendant.

Indorsed: No. 31. May term, 1882. J. Pierpont Morgan *v.* Thomas Struthers. Charge of the court. Filed Dec'r 28, 1885.

52 *Judgment Docket Entry.*

No: 31.
Term: May.
Year: 1882.
Defendant: J. Pierpont Morgan.
Plaintiff: Thomas Struthers.
Date of judgment: Nov'r 24, 1885.
Amount: Costs.
Attorney-: George Shiras, Jr., S. P. Johnston, R. Brown.

53 *First Exception.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

Upon the trial of the issue in this cause plaintiffs offered a certain instrument of writing in words and figures following, namely:

"Whereas J. Pierpont Morgan has purchased 400 shares of the stock of the Blair Iron & Steel Company at the price of $50.00 per share, and sold by A. S. Diven, trustee of said company, now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price, pay to him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

"New York, April 4, 1873.

"(Signed) THOMAS S. BLAIR AND
"T. STRUTHERS."

And also a certain instrument of writing in words and figures following, viz:

"NEW YORK, *March 22nd*, 1875.

"In consideration of the waiver by J. Pierpont Morgan of the right of election to sell to us the 400 shares of stock in the Blair
54 Iron & Steel Company subscribed and paid for by him, as he was entitled to by agreement with us in 1873, renewed and extended for another year by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, namely, to April 4th, 1876. If he shall at that time elect to sell to us the 400 shares so subscribed and held by him we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the dates of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel, Esq., 400 shares of the stock of the said Blair Iron and Steel Company, to be held by him in trust for that purpose.

"(Signed) T. STRUTHERS.
"T. S. BLAIR."

And also a certain receipt in the words following, viz:

"MARCH 22ND, 1875.

"Drexel, Morgan and Company:

"Received of Thomas Struthers, Esq., certificate No. 137 for 1,450 shares and certificate No. 61 for 100 shares, being in all 1,550 shares, in the Blair Iron and Steel Company, which I hold in trust for Charles G. Franklyn, 250 shares; E. E. Gardner, 200 shares; J. W. Drexel, 400 shares; J. P. Morgan, 400 shares; J. J. Goodwin, 200 shares; C. H. Dabney, 100 shares, making a total of 1,550 shares, to be held as collateral security for an extension of right to call on T. S. Blair and Thomas Struthers to purchase a similar amount
55 of said stock (said extension to be for one year), as per previous agreement.

"(Signed) JOSEPH W. DREXEL."

And thereupon the plaintiff having made proof that he had paid in full for the said 400 shares of stock, and having offered testimony to show a tender to the defendants, on the 4th day of April, 1876, of the said 400 shares of original stock, and also of said 400 shares of collateral stock, and the demand on them that they purchase the said stock in accordance with the aforesaid papers in evidence, rested his case.

And thereupon the defendant, by his counsel, made the following offer, to wit:

"Defendant's counsel offers in evidence the depositions of Thomas Struthers and Thomas S. Blair, and to follow them with other testimony and evidence to sustain the allegations and facts contained

in the plea which the defendants filed by leave of court to-day, which plea is as follows:

And, for further plea in this behalf to the original and additional counts filed by said plaintiff, the said defendant, by his attorneys, says that by reason of anything contained in said count the said plaintiff ought not to have or maintain his said action against him, because he says that the 400 shares of stock referred to in the said count as having been purchased on the 4th day of April, 1873, by the plaintiff from A. S. Diven, trustee, had not been subscribed for or purchased at the time of the delivery and execution of said agreement of April 4th, 1873, but that, on the contrary, the subscription for and purchase of said stock and the execution and delivery
56 of said agreement were simultaneous acts, and the making and delivery of said agreement constituted the consideration for said subscription and purchase.

And the said defendant alleges that the said agreement of subscription and purchase was in writing, in the words and figures following, to wit:

NEW YORK, *Jan'y* 20, 1873.

The capital stock of the Blair Iron and Steel Company is 25,000 shares of one hundred dollars each—$2,500,000. This capital has been paid up by the transfer of the patents for the Blair process and the works at Glenwood, 23rd ward of Pittsburgh, Penn'a, to the company, the deed for the Glenwood property to be made as soon as any empowering act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure, and the whole stock of said company issued to us in payment therefor.

We have agreed to place in the hands of Gen. A. S. Diven, as trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, except fifty thousand dollars of the proceeds thereof first to be paid to us by said trustee. The trustees of the company have, with our consent, ordered the sale of six thousand of said shares for the purpose of raising a present working capital and paying said fifty thousand dollars, the minimum price to be fifty dollars per share; and said trustees, with the approbation of the board of trustees, now offer said six thousand shares at said minimum price of fifty dollars per share, to be paid for as follows, namely: One-
57 third part thereof as soon as the whole six thousand shares shall be subscribed for and the remainder in such instalments as the board of trustees may call for the same for the purposes of the business, the certificates to be delivered when the whole shall be paid.

THOMAS S. BLAIR.
T. STRUTHERS.
MORRISON FOSTER,
By his attorney, T. STRUTHERS.

We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth, but this sub-

scription not to be binding until the whole six thousand shares shall have been reliably subscribed.

GEORGE TALBOT OLYPHANT,	400 shares.
THOMAS DICKSON,	400 shares.
A. S. DIVEN,	400 shares.
J. PIERPONT MORGAN,	500 shares.
J. W. DREXEL,	500 shares.
C. MEYER,	600 shares.
CHARLES G. FRANKLYN,	250 shares.
(By JAMES J. GOODWIN.)	
EDW. C. GARDNER, *Att'y*,	100 shares.
EMIL HEINEMAN,	200 shares.
W. J. SYMS,	150 shares.
THOMAS ALLEN, per power of attorney,	
H. G. MARQUAND,	200 shares.
GOUVERNEUR STUYVESANT,	200 shares.
LENNOX SMITH,	50 shares.

58 And this defendant alleges further that there were two other subscription papers beside that of which the foregoing is a copy, of the same terms and tenor as the said copy, and that there were three subscribers to said two other subscription papers, which three subscribers, taken together, subscribed 1,800 shares of the capital stock, thus making up the entire six thousand shares of stock above mentioned.

And this defendant alleges further, on information and belief, as follows: That the said defendant and Thomas S. Blair were the principal projectors of the enterprise and promoters of the enterprise and scheme of manufacturing steel by the process known as the "Blair" process (the said Blair being the author and inventor of that process), and were so known to the plaintiff at the time of the execution and delivery of said agreement, and at the same time were the principal projectors and promoters of the scheme for securing the subscription for said six thousand shares, and were known to the plaintiff as such at that time, and were also at that time and were known by the plaintiff to be at that time the owners, together with Morrison Foster, above named, of all or nearly all the capital stock of said company, excepting the 9,000 shares placed in the hands of A. S. Diven, as trustee.

And the defendant alleges further that said agreement of April 4th, 1873, set forth in the said count was demanded by the plaintiff as a condition of the alleged purchase of and his subscription for said 400 shares, and was executed by the said defendant and delivered to the plaintiff and accepted by him privately and without the

59 consent or knowledge of parties who signed the said subscription for six thousand shares after the plaintiff, and also without the consent or knowledge of parties who signed the said subscription before the plaintiff; and the said defendant therefore avers that said agreement was null and void as against public policy and as a fraud upon such other subscribers, and this the said defendant is ready to verify."

To the foregoing offer the plaintiff, by his counsel, made objection, first, because the agreement being such as under the statute of frauds in the State of New York (at which place the contract was made) is required to be in writing it is not competent to show any other consideration therefor than that named in the agreement itself; secondly, because the matters set out in the plea are *res inter alios acta*, neither the Blair Iron and Steel Company nor the other subscribers to the capital stock of the Blair Iron and Steel Company being any parties to this action or complaining of any fraud upon them; third, because—admitting, for the purpose of argument, the allegations of the plea—they do not constitute any defence to this action upon the part of Thomas Struthers, nor do they indicate any fraud perpretrated upon the part of any person, there being no allegation or pretense that the subscribers did not pay to the trustees the entire consideration for the stock; fourth, that, even if it were true that the agreement constituted a fraud (as it does not), Thomas Struthers cannot defend by setting up a fraud to which he was a party, and, according to the facts set out in the plea, the
60 party actor; and, fifth, because incompetent and irrelevant generally.

The court overruled the objection and admitted the evidence; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly. The evidence admitted under the foregoing offer, in so far as material to be quoted, was as follows, namely:

Deposition of Thomas Struthers.

Q. State whether, in connection with Thomas S. Blair, you signed an agreement, dated April 4th, 1873, in respect to the stock of the Blair Iron & Steel Co.

A. I did.

Q. What particular stock of the Blair Iron and Steel Co. is it that was the subject of the agreement of April 4th, 1873?

A. It was part of the six thousand shares of stock which had been placed in the hands of A. S. Diven, as trustee, to be sold according to the terms of the prospectus offering the same for sale.

Q. Was the entire six thousand shares subscribed and paid for?

A. It was all subscribed and all paid, except a portion of that subscribed by one C. Meyer.

Q. Did all the subscribers receive papers similar to that given the plaintiff bearing date April 4th, 1873?

A. None received them but those who refused to subscribe stock without them; the subscribers for about half the whole number of shares did not receive them.

Q. Were those who did not receive them informed that they were given to others?

A. No.

61 Q. Were you familiar with the negotiations connected with the obtaining of subscriptions?

A. Yes; so far as most of the subscriptions were concerned. I was a director of the company and interested in procuring subscrip-

tions. I had frequent conferences with the gentlemen who were canvassing for subscriptions and was thus kept informed of the progress made and the difficulties to be met. Some of the subscriptions I obtained myself. I recollect presenting the subscription paper to John H. Walker, who subscribed without anything having been said about such agreements and without any knowledge of them, so far as I know or have reason to believe.

Q. Can you name such of the subscribers as received similar agreements?

A. Yes; they were J. W. Drexel, J. P. Morgan, C. G. Franklyn, C. H. Dabney, E. Heineman, E. E. Gardner, W. J. Syms, Edwin Harrison, and C. Meyer. I believe that is all.

Q. How came the agreements given to these subscribers to be executed?

A. Negotiations had been in progress for some time; considerable portion of the stock had been subscribed and the remainder of it supposed to be arranged for; but when it came to closing the matter up some of the parties, amongst whom were these plaintiffs, concluded not to go in unless on some such agreement as this. The terms of the subscription paper required the whole six thousand shares to be subscribed before any individual subscription
62 would be binding. We thought it better to give such agreements than to have more time spent in canvassing. An agreement was accordingly prepared for each of those declining for that reason, and those for Mr. Drexel and these plaintiffs handed to Mr. Lennox Smith, I think, except that for Mr. Harrison, which I think was placed in the hands of Mr. Alexander L. Holley, all to be delivered to the several parties upon their subscribing for stock. That was the condition upon which they were to be delivered. They were accepted and the subscriptions made, and thus, with the other subscriptions, the whole amount of six thousand shares was made up.

Q. Do you know of any other matter, &c., &c.?

A. I do not think of any other matter or thing within my personal knowledge that would be material and competent for me to state in the several cases mentioned in the commission, except that neither of these plaintiffs held stock in the Blair Iron and Steel Company before these subscriptions.

Cross-interrogatories:

Q. In the transactions referred to in the several agreements you mention did you deal with each of the plaintiffs individually or with Mr. Drexel, representing all of them?

A. In such conferences as I had with Mr. Drexel in reference to the transactions referred to in the several agreements mentioned I conferred with him as to what he himself might do and as a person in whom the plaintiffs and others seemed to have confidence
63 and whose lead they would be likely to follow, but that he was their authorized agent or representative neither he nor they disclosed to me. The subscriptions were made by each of the plaintiffs in his own name.

Q. Who paid the money received for the stock involved in these suits; was it paid by the plaintiffs in person or was it paid by Mr. Drexel, acting for them?

A. Whether the money was paid in by each one personally or by Mr. Drexel, acting for them, I don't know.

Deposition of Thomas S. Blair.

A. My name is Thomas S. Blair; age, 59 years or thereabouts; my present residence is Huntingdon Furnace, Huntingdon county, Penna.

Q. Do you know the parties to the foregoing suits?

A. Some of them.

Q. State whether, in connection with Thomas Struthers, you signed an agreement dated April 4th, 1873, in respect to the stock of the Blair Iron and steel Company.

A. Yes, sir.

* * * * * * *

Q. State what particular stock of the Blair Iron and Steel Company is it that was the subject of the agreement of April 4, 1873.

A. It was a special lot of six thousand shares set aside for specific purpose, as was declared and specified in the subscription paper to which the said parties, hereinbefore named as plaintiffs attached their signatures as subscribers to that stock. The substance of
64 that declaration was that the six thousand shares had been put into the hands of a trustee to be sold, the proceeds of such sale to be applied to the uses of the company for purposes therein set forth.

Q. Were the entire six thousand shares subscribed and paid for?

A. Yes, sir.

Q. Did all the subscribers receive papers similar to that given plaintiffs, bearing date April 4, 1873?

A. No.

Q. If there were those who did not receive such papers, were they informed that such papers had been given to others?

A. No.

Q. Were you familiar with the negotiations connected with the obtaining of such subscriptions?

A. Although the negotiations were mainly conducted by other parties, I was cognizant of the circumstances more or less minutely in each case.

Q. Can you name such of the subscribers as received papers similar to that of April 14, 1873?

A. They were—besides the plaintiffs here specified, to wit, Dabney, Morgan, Francklyn, Goodwin, Harrison, Gardner, and Lewis—the following, whose names I recall on the spur of the moment: Christopher Meyer, W. J. Syms, Jos. W. Drexel, J. J. Hegeman, of whom I am positive. I think that similar agreements were also given to Thomas Allen and Thomas A. Scott. Among those
65 who did not receive such agreement I recall the names of J. Talbot Olyphant, Thomas Dickson, A. S. Diven, John H.

Walker, Gouverneur Morris. Having no list of stockholders within reach whereby to refresh my memory, I cannot at present remember any others.

Q. How came the agreements given to these subscribers to be executed?

A. The parties to whom these papers, known as guarantee agreements, were given had been holding under advisement the idea of subscribing for this stock, and when we found that they would not do so on the proposition set forth in the subscription paper itself, we offered this additional inducement, in virtue of which they made the subscriptions as they stand. The agreements of the succeeding year (1874) were simply in the nature of an extension for 12 months of the terms and conditions of the guarantee agreement of 1873.

In a deposition of THOMAS S. BLAIR, taken subsequent to the one just quoted from, he testified further as follows:

"A. I am now satisfied that neither Thomas Allen nor Mr. Marquand had any agreement from us to take back stock. I never met either of those gentlemen on business. Mr. Alexander L. Holley and Mr. Miller transacted this affair exclusively. I am now also able to state that no guarantee paper was given to Mr. Scott. By reference to correspondence had at the time I find that both in 1875 and 1874 negotiations were carried along with Mr. Harrison by letter, all of it subsequent to April 4, in 1874, and later than April 4, 1875, in both cases resulting in giving him the guarantee for the extended time. At the time of making the answers in the original interrogatories I was suddenly called upon to state to the best of my recollection, without any possibility of being able to consult a single written memorandum or document of any description, and had to depend upon impressions left upon my mind after a long lapse of time."

Testimony of Thomas Dixon.

Q. I show you paper marked Exhibit No. 1, containing what purports to be your signature. Do you recognize it?

A. Yes, sir.

Q. Thomas Dixon, 400 shares?

A. Yes, sir.

Q. Do you remember making the subscription?

A. I do.

Q. You are now president of the Delaware & Hudson Canal Co.?

A. Yes, sir.

Q. Were you connected with that company at the time this subscription was made, in 1873?

A. I was then president.

Q. Do you know the signature of Goorge Talbot Olyphant, which precedes yours?

A. Yes, sir; that is his signature.

Q. Was he also connected with the Delaware and Hudson Canal Company at that time?

A. Yes, sir.

Q. He has since died?

67 A. Yes, sir.

Q. At the time you made that subscription did you know of any inducement being offered to any of these subscribers in the nature of a collateral guaranty or agreement to buy back the shares?

(Objected to; objection overruled; exception taken.)

Q. Did you ever see at the time you were applied to for the subscription any paper of the kind which I now show you, as being furnished to persons who would make these subscriptions? (Handing Ex. A.)

A. No, sir.

Q. Do you know whether Mr. Olyphant had such a paper or not?

A. Not to my knowledge.

Q. You were on very intimate terms with him at that time?

A. It was at his instance I made the subscription.

Q. At his suggestion?

A. Yes, sir.

Q. Did you pay your entire subscription?

A. I did.

Q. Two thousand?

A. Yes, sir.

Q. And did Mr. Olyphant pay his?

A. I think so; I do not know.

Cross-examination:

Q. You do not know that Olyphant paid?

A. No.

Q. You did not see him pay it?

A. No.

68 GOUVERNEUR MORRIS, JR., called on behalf of defendant, being duly sworn, testified as follows:

Q. I show you Exhibit No. 1, purporting to have, towards the bottom of it, your name, Gouvernuer Morris, Jr., 50 shares—third from the bottom.

A. That is my signature.

Q. Did you pay for those shares?

A. I did.

Q. D- -ou remember who brought the project to your notice?

A. Mr. Lennox Smith.

Q. Were the previous signatures upon the paper when you signed?

A. Yes, sir; as far as I can remember; there might have one or two not; there were a number of signatures; the paper was largely filled.

Q. Mr. Meyer, Mr. Morgan, and the important signatures were there?

A. Yes, sir.

Q. You know them by reputation?

A. Yes, sir.

Q. Did you know at the time the proposition was brought to your notice that any of the subscribers were getting, as an inducement to subscribe, any guaranty or paper agreeing to take back the shares?

(Objected to as immaterial and irr-levant; objection over-ruled; exception taken.)

Q. Did you see, at any time before you subscribed, any paper like the one I now show as being executed by Blair & Struthers as an inducement for subscription?

(Same objection, ruling, and exception.)

A. No, sir; saw nothing of the kind.

69 Q. You did not have any?

A. No, sir.

Q. Did you know that any of the previous subscribers had received such an indemnity?

A. No, sir.

Q. When did you first know of it?

A. When I was subpœnaed in this case.

Q. When this controversy grew up?

A. Yes, sir.

Q. Within a year or so?

A. Within a few weeks.

Cross-examined:

Q. Do you know what has become of this company?

A. I believe it is in the hands of a receiver.

HENRY G. MARQUAND, called on behalf of defendant, being duly sworn, testified as follows:

Q. I show you paper marked Exhibit No. 1, with the words "Thomas Allen, 200 shares, per power of attorney, H. G. Marquand," fourth signature from the bottom; is that in your handwriting?

A. Yes, sir.

Q. Do you remember the enterprise, the prospectus being brought to your notice?

A. I do not recollect that paper, though I may have seen it. This matter was brought to me. Mr. Lennox Smith called on me and told me there was a new process. This enterprise was submitted to me and I declined to go in. Mr. Allen was in town and was interested—he lived then in St. Louis—and I spoke to him about it,

70 and I think Mr. Smith had a conversation then with him, and he represented it to him. Mr. Allen turned around to me and said, I think that is a good thing; it will advance your western interest. He read it over and said he would see about it in a few days. He then charged me when the agreement came in to sign it for him; either he had to go away or was out of town, and he charged me directly to subscribe. I think it was ten thousand dollars or two hundred shares for him. That is all I know about it.

Q. Did you, at the time the matter was brought to your attention—the enterprise—by Mr. Smith or any one else, know of any

guarantee being offered to the subscribers of the nature of Exhibit A, which I show you?

(Objected to as irrelevant and immaterial; objection overruled; exception taken.)

A. I heard something about a guarantee, whether at that time or later, I do not know. It may have been urged upon him. I cannot say definitely about that. At the first inspection of it there was nothing said about the guarantee itself, but I heard about it.

Q. But when you heard about it you do not know?

A. As regards Allen?

Q. Yes; at the time you made the subscription.

A. I do not know whether he got any guarantee or not.

Q. Did you get any for him?

A. No; not to my knowledge.

Q. You made the subscription—you signed the paper?

A. Yes, sir; he paid for it and attended to all the subsequent details himself.

Q. When you signed his name, Marquand, as attorney, you had not received any such guarantee?

71 A. No, sir.

Cross-examined:

Q. You do not know whether he got one or not?

A. No, sir; he charged me specifically to sign that paper for him.

Q. That is all you had to do with it?

A. Yes, sir.

Q. You declined to invest on your own account?

A. Yes, sir.

Q. Mr. Allen subsequently paid the subscription?

A. He paid all his debts; he was a very particular man.

Q. Was he a relative of yours?

A. He was my brother-in-law; there is no doubt it was paid; he left four or five or six millions; it has been paid without a doubt.

Prospectus and subscription by the plaintiff and others, dated New York, Jan'y 20th, 1873, in the same figures and terms as set out in the plea.

The following abstract from the plaintiff's affidavit of claim filed in this case:

"Plaintiff, being duly sworn according to law, deposes and says that the defendants above named are justly and truly indebted to plaintiff in the sum of $26,282.19, being amounts paid by the plaintiff for 400 shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, with 7 per cent. interest per annum from the dates of the payments by plaintiff made upon said stock. Deponent attaches hereto

72 and makes part hereof exhibit marked 'A,' showing the various payments made by plaintiff on said stock and the dates thereof and the calculations of interest on said payments, which he says is true and correct in every particular. Said indebtedness

arose as follows: On April 4, 1873, the said defendants executed and delivered to said plaintiffs a certain agreement in the words and figures following, viz:

"'Whereas J. Pierpont Morgan has purchased 400 shares of stock of the Blair Iron and Steel Company at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company:

"'Now, we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay him the amount paid by him on the same, with interest at the rate of 7 per cent. per annum.

"'New York, April 4, 1873.

"'THOMAS S. BLAIR.
"'T. STRUTHERS.'

"And in consideration of the foregoing agreement said plaintiff subscribed for and took and paid for 400 shares of said company's stock, as shown by Exhibit A aforesaid."

W. McKENNAN, [SEAL.]
Cir. Judge.

73 *Second Exception.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

Upon the trial of the issue in this cause, defendant having closed his case, the plaintiff, by his counsel, offered to show that the sale of stocks accompanied by a personal guaranty of like character with that sued on in this case is a prevalent usage and custom prevailing in commercial circles in New York city and elsewhere and was at the time that the subscription was made to the stock of Diven, trustee; to which offer of evidence the defendant, by his counsel, made the objection that it was irrelevant and incompetent. The court sustained the objection and excluded the evidence; to which decision of the court plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

74 *Third Exception.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

Upon the trial of the issue in this cause the court, in its charge to the jury, having instructed them that the plaintiff's case standing alone was such as would have entitled him to a verdict, and having further instructed them that the defendant relied for his defence upon the fact, as he alleged and offered evidence to show, that the guaranty given by the defendant to the plaintiff was exceptional, in this, that a similar guaranty was not given to each and all of the co-*sub*subscribers with the plaintiff to the stock of the Blair Iron & Steel Company in question, then said: "So, gentlemen of the jury, I instruct you that this case, leaving everything else out of it, turns upon the sufficiency of the proof, in your judgment, as to whether some and not all of the subscribers to this stock were benefited by the arrangement which was made with Mr. Morgan, the plaintiff. I will not refer in detail to the evidence upon this point, because * * * If you find that such a special and exceptional arrangement made with Mr. Morgan was not made known to all of the subscribers to
75 the stock, Mr. Morgan had no right to make it, and the law will not enforce it. So, I say again, as you find the facts with regard to that so you will find whether this arrangement is enforcible or not. I repeat, if you find that it was not made known to all of the subscribers to that stock, it can avail Mr. Morgan nothing and cannot be enforced as he seeks to enforce it now. * * * If you find that the beneficial arrangement set up and sought to be enforced in this suit was not made known to all of the subscribers to that stock and they were not afforded an opportunity to avail themselves of like security, as matter of law that arrangement was void, and cannot be enforced, and that is the simple question which I submit to you in this case. If you find that there were any of the subscribers of that stock who were left out and were not afforded the security that Mr. Morgan obtained, the latter cannot avail himself of this arrangement, and your verdict should be for the defendant."

To which portion of the charge of the court plaintiff excepted and prayed to the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

76 *Fourth Exception.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, made this offer of evidence, namely, to show by a witness, Philip S. Miller, that he acted in connection with this matter as the agent of Messrs. Blair and Struthers; that he is familiar with the whole transaction relative to the stock subscription that had been testified to; that a guarantee such as was given to the plaintiff in this case was given to all subscribers who asked therefor, and that guarantees were given to subscribers stated in Mr. Blair's deposition as not having received any guarantees, and that guarantees were also given to other parties testified to by defendants as not having received any; that as to the first subscribers upon the list, Messrs. Dickson and Olyphant, they were themselves iron masters, thoroughly familiar with the enterprise personally and by reason of an examination caused to be made at their instance by a distinguished engineer, who reported to them, and that they, the first subscribers, were the parties who introduced the matter to the plaintiff and others and introduced Mr. Blair
77 to the plaintiff and others, and induced the plaintiff and others in part to go into the enterprise—all this for the purpose of showing that there was no fraud in fact nor concealment in connection with the guarantee in suit, and for the purpose of rebuttal and contradiction; to which offer of the plaintiff the defendant, by his counsel, objected; that it was immaterial, irrelevant, and incompetent; and thereupon the court decided, "the plaintiff can show that some of those persons stated not to have gotten guarantees did get them, but the rest of the offer is incompetent. It is not necessary for the defendants to sustain their defence to show actual fraud. If the tendency of such things is to operate as a fraud upon others, that is the basis of the rule, and not that they were actually deceived."

To which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

78 *Fifth Exception.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, Impleaded with T. S. BLAIR. } No. 31.

Upon the trial of the issue in this cause the defendant, by his counsel, requested the court to charge the jury as follows, namely: "That if they find that the agreement sued on of April 4, 1873, was demanded and obtained by the plaintiff from Struthers and Blair as a condition upon which the plaintiffs subscribed for and purchased 400 shares of stock of the Blair Iron and Steel Company; that the plaintiff was one of a number of persons who were called on to subscribe and did subscribe for the stock in said company, to the amount in the aggregate of six thousand shares, upon the same terms and conditions set forth in the prospectus and contract of subscription, and that others of said subscribers were not informed of the fact that the plaintiff had obtained said agreement of April 4, 1873, as a condition or part of his agreement to subscribe for the said stock, and that the existence of such accompanying agreement was not made known to the others of said common subscribers, then said agreement of April 4, 1873, was, in the eye of the law, a fraud upon the other subscribers who did not receive and were not informed of the existence of such agreement, and was contrary
79 to the policy of the law, and the plaintiff cannot recover."

And the court did charge as requested, making answer: "This point is affirmed, and I so instruct you."

To which decision of the court the plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

80 *Sixth Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"If the jury find from the evidence that the defendant Struthers executed and delivered to the plaintiff the paper in evidence, of date April 4, 1873, and also the subsequent paper, of date March 25, 1875, and that on April 4, 1876, plaintiff notified said defendant of his (the plaintiff's) election to sell to the defendant the stock in said papers mentioned and made tender thereof, and that the defendant refused to accept said stock and pay therefor, then their verdict should be for the plaintiff for the amount by him paid for said stock, as shown by the evidence, with interest thereon, as in said original paper specified."

To which point the court answered:

"This point is affirmed, but subject to the effect of the proof introduced by the defendant touching the exceptional engagement made by Struthers and Blair for the purchase of the stock subscribed for by the plaintiff."

To which qualified affirmance plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

81 *Seventh Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"If the jury find from the evidence that the stock purchased by the plaintiff was stock originally issued by the Blair Iron and Steel Company to the defendant Struthers and Thomas S. Blair and Morrison Foster as full-paid stock, and that these parties, owners thereof, voluntarily agreed that the same, together with other likd stock owned by them, should be sold at a minimum price by theres named, in part for the benefit of the Blair Iron and Steel Companye and in part for their own benefit, and transferred said stock to ay trustee, to be by him so sold and accounted for, and that the sair stock was so sold by said trustee, then, if the jury find also the facts as set out in the first point, the plaintiff is entitled to recover, whether said stock was sold to all purchasers who paid the minimum price upon the same terms or not."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

82 *Eighth Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That unless the jury find from the evidence that the obligations sued on were purposely concealed from the other purchasers of stock from A. S. Diven, trustee, or that any such purchaser desiring a similar obligation was refused the same, they should find for the plaintiff, if they find from the evidence that notice was given and tender made to the defendant Struthers on April 4, 1876, as required by said obligations."

Which point the court refused; to which decision the plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

83 *Ninth Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That the execution and delivery to plaintiff of the obligations sued on as a consideration for plaintiff's purchase of four hundred shares of said stock of the Blair Iron & Steel Company from A. S. Diven, trustee, was not, under the evidence, a fraud in fact and was not a fraud in law."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

84 *Tenth Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That there is no evidence in this case that the making of the obligations sued — was concealed by the defendants from purchasers of the six thousand shares, or of any portion thereof, of the stock sold by A. S. Diven, trustee."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

85 *Eleventh Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That if the defendants, Struthers and Blair, in consideration that the plaintiff would purchase certain of the stock owned by them and Morrison Foster jointly (and by them voluntarily contributed to be sold by trustee for the mutual benefit of themselves and the Blair Iron and Steel Company), agreed with the plaintiff to repurchase from him, at his option, within a time named, the stock by him bought by the said trustee, said agreement is binding on them, even though no similar agreement was made with other purchasers of said stock from said trustee."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

86 *Twelfth Exception.*

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That there is no evidence in this case that any of the stockholders in the Blair Iron and Steel Company were in any way defrauded by reason of the execution and delivery of the writing sued on and in evidence, or that any of said stockholders claims to have been so defrauded."

Which point the court refused; to which decision the plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

(The foregoing bills of exception endorsed as follows:) No. 31. May term, 1882. Morgan *vs.* Struthers. Bills of exception. Filed Dec'r 11th, 1885. H. D. Gamble, clerk.

87 *Bond.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

J. P. MORGAN *vs.* THOMAS STRUTHERS.

Whereas lately at Pittsburgh, Pennsylvania, in a suit depending in said court between J. Pierpont Morgan and Thomas Struthers, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment, in the aforesaid suit:

Now, we, J. Pierpont Morgan, of New York city, in the State of New York, and David A. Stewart, of Pittsburgh, in the county of Allegheny and State of Pennsylvania, undertake and bind ourselves to pay or cause to be paid to defendant all costs that shall accrue in the prosecution of said writ of error.

Witness our hands and seals this 11th day of December, A. D. 1885.

J. P. MORGAN, [SEAL.]
By JOHN DALZELL, *Att'y.*
D. A. STEWART. [SEAL.]

Signed and sealed in presence of—
H. J. LINDSAY.

Indorsed: December 12, 1885, the within bond approved. M. W. Acheson, U. S. Judge. No. 31. May term, 1882. J. Pierpont Morgan *vs.* Thomas Struthers. Bond. Filed Dec'r 12, 1885. H. D. Gamble, clerk.

88 *Assignments of Error.*

In the Circuit Court of the United States, Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs.
THOMAS STRUTHERS, &c. } No. 31.

I. The court below erred in its ruling as set out in the bill of exception, which is as follows, viz:

Upon the trial of the issue in this cause plaintiffs offered a certain instrument of writing in words and figures following, namely:

"Whereas J. Pierpont Morgan has purchased 400 shares of the stock of the Blair Iron and Steel Company at the price of $50.00 per share and sold by A. S. Diven, trustee of said company:

"Now, we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price — pay to him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

"New York, April 4, 1873.

"(Signed) THOMAS S. BLAIR AND
"T. STRUTHERS."

And also a certain instrument of writing in words and figures following:

"NEW YORK, *March 22d*, 1875.

89 "In consideration of the waiver by J. Pierpont Morgan of the right of election to sell to us the 400 shares of stock in the Blair Iron and Steel Company subscribed and paid for by him, as he was entitled to by agreement with us in 1873, renewed and extended for another year by agreement of 1874 to April 4th, 1875, we do hereby agree that his right to do so shall be extended for another year, namely, to April 4, 1876. If he shall at that time elect to sell to us the 400 shares so subscribed and held by him we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent. per annum from the dates of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel, Esq., 400 shares of the stock of the said Blair Iron & Steel Company, to be held by him in trust for that purpose.

"(Signed) T. STRUTHERS.
"T. S. BLAIR."

And also a certain receipt in the words following, viz:

"MARCH 22ND, 1875.

"Drexel, Morgan & Company:

"Received of Thomas Struthers, Esq., certificate No. 137 for 1,450 shares and certificate No. 61 for 100 shares, being in all 1,550 shares, in the Blair Iron and Steel Co, which I hold in trust for Charles G. Franklin, 250 shares; E. E. Gardner, 200 shares; J. W. Drexel, 400 shares; J. P. Morgan, 400 shares; J. J. Goodwin, 200 shares; C. H. Dabney, 100 shares, making a total of 1,550 shares, to be held as collateral security for an extension of right to
90 call on T. S. Blair and Thomas Struthers to purchase a similar amount of said stock (said extension to be for one year), as per previous agreements.

"(Signed) JOSEPH W. DREXEL."

And thereupon the plaintiff having made proof that he had paid in full for the said 400 shares of stock, and having offered testimony to show a tender to the defendants, on the 4th day of April, 1876, of the said 400 shares of original stock, and also of said 400 shares of collateral stock, and the demand on them that they purchase the said stock in accordance with the aforesaid papers in evidence, rested his case.

And thereupon the defendant, by his counsel, made the following offer, to wit:

"Defendant's counsel offers in evidence the depositions of Thomas Struthers and Thomas S. Blair, and to follow them with other testimony and evidence to sustain the allegations and facts contained in the plea which the defendants filed by leave of court to-day, which plea is as follows:

And, for further plea in this behalf to the original and additional counts filed by said plaintiff, the said defendant, by his attorneys, says that by reason of anything contained in said count the said plaintiff ought not to have or maintain his said action against him, because he says that the 400 shares of stock referred to in the said count as having been purchased on the 4th day of April, 1873, by the plaintiff from A. S. Diven, trustee, had not been subscribed for or purchased at the time of the delivery and execution of said
91 agreement of April 4, 1873, but that, on the contrary, the subscription for and purchase of said stock and the execution and delivery of said agreement were simultaneous acts, and the making and delivery of said agreement constituted the consideration for said subscription and purchase.

And the said defendant alleges that the said agreement of subscription and purchase was in writing, in the words and figures following, to wit:

NEW YORK, *Jan'y* 20, 1873.

The capital stock of the Blair Iron and Steel Company is 25,000 shares of one hundred dollars each—$2,500,000. This capital has been paid up by the transfer of the patents for the Blair process

and the works at Glenwood, 23rd ward of Pittsburgh, Penn'a, to the company, the deed for the Glenwood property to be made as soon as any empowering act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure, and the whole stock of said company issued to us in payment therefor.

We have agreed to place in the hands of Gen. A. S. Diven, as trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, except fifty thousand dollars of the proceeds thereof first to be paid to us by said trustee. The trustees of the company have, with our consent, ordered the sale of six thousand of said shares for the purpose of raising a present working capital and paying
92 said fifty thousand dollars, the minimum price to be fifty dollars per share; and said trustees, with the approbation of the board of trustees, now offer said six thousand shares at said minimum price of fifty dollars per share, to be paid for as follows, namely:

One-third part thereof as soon as the whole six thousand shares shall be subscribed for and the remainder in such instalments as the board of trustees may call for the same for the purposes of business, the certificates to be delivered when the whole shall be paid.

THOMAS S. BLAIR.
T. STRUTHERS.
MORRISON FOSTER,
By his attorney, T. STRUTHERS.

We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth, but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed.

GEORGE TALBOT OLYPHANT,	400 shares.
THOMAS DICKSON,	400 shares.
A. S. DIVEN,	400 shares.
J. PIERPONT MORGAN,	500 shares.
J. W. DREXEL,	500 shares.
C. MEYER,	600 shares.
CHARLES G. FRANKLYN,	250 shares.
(By JAMES J. GOODWIN.)	
EDW. C. GARDNER, *Att'y*,	100 shares.
EMIL HEINEMAN,	200 shares.
93 W. J. SYMS,	150 shares.
THOMAS ALLEN, per power of attorney,	
H. G. MARQUAND,	200 shares.
GOUVERNEUR STUYVESANT,	200 shares.
LENNOX SMITH,	50 shares.

And this defendant alleges further that there were two other subscription papers beside that of which the foregoing is a copy, of the same terms and tenor as the said copy, and that there were three subscribers to said two other subscription papers, which three

subscribers, taken together, subscribed 1,800 shares of the capital stock, thus making up the entire six thousand shares of stock above mentioned.

And this defendant alleges further, on information and belief, as follows: That the said defendant and Thomas S. Blair were the principal projectors of the enterprise and promoters of the enterprise and scheme of manufacturing steel by the process known as the "Blair" process (the said Blair being the author and inventor of that process), and were so known to the plaintiff at the time of the execution and delivery of said agreement, and at the same time were the principal projectors and promoters of the scheme for securing the subscription for said six thousand shares, and were known to the plaintiff as such at that time, and were also at that time and were known by the plaintiff to be at that time the owners, together with Morrison Foster, above named, of all or nearly all the capital stock of said company, excepting the 9,000 shares placed in the hands of A. S. Diven, as trustee.

94 And the defendant alleges further that the said agreement of April 4th, 1873, as set forth in said count, was demanded by the plaintiff as a condition of the alleged purchase of and his subscription for said 400 shares, and was executed by the said defendant and delivered to the plaintiff and accepted by him privately and without the consent or knowledge of parties who signed the said subscription for six thousand shares after the plaintiff, and also without the consent or knowledge of parties who signed the said subscription before the plaintiff; and the said defendant therefore avers that said agreement was null and void as against policy and as a fraud upon such other subscribers, and this the said defendant is ready to verify."

To the foregoing offer the plaintiff, by his counsel, made objection, first, because the agreement being such as under the statute of frauds in the State of New York (at which place the contract was made) is required to be in writing it is not competent to show any other consideration therefor than that named in the agreement itself; secondly, because the matters set out in the plea are *res inter alios acta*, neither the Blair Iron and Steel Company nor the other subscribers to the capital stock of the Blair Iron and Steel Company being any parties to this action or complaining of any fraud upon them; third, because—admitting, for the purpose of argument, the allegations of the plea—they do not constitute any defence

95 to this action upon the part of Thomas Struthers, nor do they indicate any fraud perpetrated upon the part of any person, there being no allegation or pretense that the subscribers did not pay to the trustees the entire consideration for the stock; fourth, that, even if it were true that the agreement constituted a fraud (which it does not), Thomas Struthers cannot defend by setting up a fraud to which he was a party, and, according to the facts set out in the plea, the party actor; and, fifth, because incompetent and irrelevant generally.

The court overruled the objection and admitted the evidence; to which decision plaintiff excepted and prayed the court to seal this

his bill of exceptions, which is done accordingly. The evidence admitted under the foregoing offer, in so far as material to be quoted, was as follows, namely:

Deposition of Thomas Struthers.

Q. State whether, in connection with Thomas S. Blair, you signed an agreement, dated April 4th, 1873, in respect to the stock of the Blair Iron and Steel Company.

A. I did.

Q. What particular stock of the Blair Iron and Steel Co. is it that was the subject of the agreement of April 4th, 1873?

A. It was part of the six thousand shares of stock which had been placed in the hands of A. S. Diven, as trustee, to be sold according to the terms of the prospectus offering the same for sale.

96 Q. Was the entire six thousand shares subscribed and paid for?

A. It was all subscribed and all paid, except a portion of that subscribed by one C. Meyer.

Q. Did all the subscribers receive papers similar to that given the plaintiff, bearing date April 4th, 1873?

A. None received them but those who refused to subscribe stock without them; the subscribers for about half the whole number of shares did not receive them.

Q. Were those who did not receive them informed that they were given to others?

A. No.

Q. Were you familiar with the negotiations connected with the obtaining of subscriptions?

A. Yes; so far as most of the subscriptions were concerned. I was a director of the company and interested in procuring subscriptions. I had frequent conferences with the gentlemen who were canvassing for subscriptions and was thus kept informed of the progress made and the difficulties to be met. Some of the subscriptions I obtained myself. I recollect presenting the subscription paper to John H. Walker, who subscribed without anything having been said about such agreements and without any knowledge of them, so far as I know or have reason to believe.

Q. Can you name such of the subscribers as received similar agreements?

A. Yes; they were J. W. Drexel, J. P. Morgan, C. G. Franklyn, C. H. Dabney, E. Heineman, E. E. Gardner, W. J. Syms, Edwin Harrison, and C. Meyer. I believe that is all.

97 Q. How came the agreement given to these subscribers to be executed?

A. Negotiations had been in progress for some time; considerable portion of the stock had been subscribed and the remainder of it supposed to be arranged for; but when it came to closing the matter up some of the parties, amongst whom were these plaintiffs, concluded not to go in unless on some such agreement as this. The terms of the subscription paper required the whole six thousand shares to be subscribed before any individual subscrip-

tion would be binding. We thought it better to give such agreements than to have more time spent in canvassing. An agreement was accordingly prepared for each of those declining for that reason, and those for Mr. Drexel and those plaintiffs handed to Mr. Lennox Smith, I think, except that for Mr. Harris, which I think was placed in the hands of Mr. Alex. L. Holley, all to be delivered to the several parties upon their subscription for stock. That was the condition upon which they were to be delivered. They were accepted and the subscriptions made, and thus, with the other subscriptions, the whole amount of six thousand shares was made up.

Q. Do you know of any other matter, &c., &c.?

A. I do not think of any other matter or thing within my personal knowledge that would be material and competent for me to state in the several cases mentioned in the commission, except that neither of these plaintiffs held stock in the Blair Iron &
98 Steel Company before these subscriptions.

Cross-interrogatories:

Q. In the transactions referred to in the several agreements you mention did you deal with each of the plaintiffs individually or with Mr. Drexel, representing all of them?

A. In such conferences as I had with Mr. Drexel in reference to the transactions referred to in the several agreements mentioned I conferred with him as to what he himself might do and as a person in whom the plaintiffs and others seemed to have confidence and whose lead they would be likely to follow, but that he was their authorized agent or representative neither he nor they disclosed to me. The subscriptions were made by each of the plaintiffs in his own name.

Q. Who paid the money for the stock involved in these suits; was it paid by the plaintiffs in person or was it paid by Mr. Drexel, acting for them?

A. Whether the money was paid in by each one personally or by Mr. Drexel, acting for them, I don't know.

Deposition of Thomas S. Blair.

"A. My name is Thomas S. Blair; age, 59 years or thereabouts; my present residence is Huntingdon Furnace, Huntingdon county, Penna.

Q. Do you know the parties to the foregoing suits?

A. Some of them.

Q. State whether, in connection with Thomas Struthers, you signed an agreement dated April 4, 1873, in respect to the stock of the Blair Iron & Steel Company.

99 A. Yes, sir.

Q. State what particular stock of the Blair Iron and Steel Company is it that was the subject of the agreement of April 4, 1873.

A. It was a special lot of six thousand shares set aside for specific purpose, as declared and specified in the subscription paper to

which the said parties hereinbefore named as plaintiffs attached their signatures as subscribers to that stock. The substance of that declaration was that the six thousand shares had been put into the hands of a trustee to be sold, the proceeds of such sale to be applied to the uses of the company for purposes therein set forth.

Q. Were the entire six thousand shares subscribed and paid for?

A. Yes, sir.

Q. Did all the subscribers receive papers similar to that given plaintiffs, bearing date April 4, 1873?

A. No.

Q. If there were those who did not receive such papers, were they informed that such papers had been given to others?

A. No.

Q. Were you familiar with the negotiations connected with the obtaining of such subscriptions?

A. Although the negotiations were mainly conducted by other parties, I was cognizant of the circumstances more or less minutely in each case.

Q. Can you name such of the subscribers as received papers similar to that of April 14, 1873?

100 A. They were—besides the plaintiffs here specified, to wit, Dabney, Morgan, Franklyn, Goodwin, Harrison, Gardner, and Lewis—the following, whose names I recall on the spur of the moment: Christopher Meyer, W. J. Syms, Joseph W. Drexel, J. J. Hageman, of whom I am positive. I think that similar agreements were also given to Thomas Allen and Thomas A. Scott. Among those who did not receive such agreement I recall the names of J. Talbot Olyphant, Thomas Dickson, A. S. Diven, John H. Walker, Gouverneur Morris. Having no list of stockholders within reach whereby to refresh my memory, I cannot at present remember any others.

Q. How came the agreements given to these subscribers to be executed?

A. The parties to whom these papers, known as guarantee agreements, were given had been holding under advisement the idea of subscribing for this stock, and when we found that they would not do so on the proposition set forth in the subscription paper itself, we offered this additional inducement, in virtue of which they made the subscriptions as they stand. The agreements of the succeeding year (1874) were simply in the nature of an extension for 12 months of the terms and conditions of the guarantee agreement of 1873."

In a deposition of THOMAS S. BLAIR, taken subsequent to the one just quoted from, he testified further as follows:

101 "A. I am now satisfied that neither Thomas Allen nor Mr. Marquand had any agreement from us to take back stock. I never met either of those gentlemen on business. Mr. Alexander L. Holley and Mr. Miller transacted this affair exclusively. I am now also able to state that no guarantee paper was given to Mr. Scott. By reference to correspondence had at the time I find that both in 1875 and 1874 negotiations were carried along

with Mr. Harrison by letter, all of it subsequent to April 4, 1874, and later than April 4, 1875, in both cases resulting in giving him the guarantee for the extended time. At the time of making the answers in the original interrogatories I was suddenly called upon to state to the best of my recollection, without any possibility of being able to consult a single written memorandum or document of any description, and had to depend upon impressions left upon my mind after a long lapse of time."

Testimony of Thomas Dixon.

Q. I show you paper marked Exhibit No. 1, containing what purports to be your signature. Do you recognize it?

A. Yes, sir.

Q. Thomas Dixon, 400 shares?

A. Yes, sir.

Q. Do you remember making the subscription?

A. I do.

Q. You are now president of the Delaware & Hudson Canal Co.?

A. Yes, sir.

102 Q. Were you connected with -at company at the time this subscription was made in 1873?

A. I was then president.

Q. Do you know the signature of George Talbot Olyphant, which precedes yours?

A. Yes, sir; that is his signature.

Q. Was he also connected with the Delaware and Hudson Canal Company at that time?

A. Yes, sir.

Q. He has since died?

A. Yes, sir.

Q. At the time you made that subscription did you know of any inducement being offered to any of these subscribers in the nature of a collateral guaranty or agreement to buy back the shares?

(Objected to; objection overruled; exception taken.)

Q. Did you ever see at the time you were applied to for the subscription any paper of the kind which I now show you, as being furnished to persons who would make these subscriptions? (Handing Ex. A.)

A. No, sir.

Q. Do you know whether Mr. Olyphant had such a paper or not?

A. Not to my knowledge.

Q. You were on very intimate terms with him at that time?

A. It was at his instance I made the subscription.

Q. At his suggestion?

A. Yes, sir.

Q. Did you pay your entire subscription?

A. I did.

103 Q. Two thousand?

A. Yes, sir.

Q. And did Mr Olyphant pay his?

A. I think so; I do not know.

Cross-examination:

Q. You do not know that Olyphant paid?
A. No.
Q. You did not see him pay it?
A. No.

GOUVERNEUR MORRIS, JR., called on behalf of defendant, being duly sworn, testified as follows:

Q. I show you Exhibit No. 1, purporting to have, towards the bottom of it, your name, Gouvernuer Morris, Jr., 50 shares—third from the bottom.
A. That is my signature.
Q. Did you pay for those shares?
A. I did.
Q. Do you remember who brought the project to your notice?
A. Mr. Lennox Smith.
Q. Were the previous signatures upon the paper when you signed?
A. Yes, sir; as far as I can remember; there might have been one or two not; there were a number of signatures; the paper was largely filled.
Q. Mr. Meyer, Mr. Morgan, and the important signatures were there?
A. Yes, sir.
Q. You know them by reputation?
104 A. Yes, sir.
Q. Did you know at the time the proposition was brought to your notice that any of the subscribers were getting as an inducement to subscribe any guaranty or paper agreeing to take back the shares?

(Objected to as immaterial and irrelevant; objection overruled; exception taken.)

Q. Did you see at any time before you subscribed any paper like the one I now show as being executed by Blair & Struthers as an inducement for subscription?

(Same objection, ruling, and exception.)

A. No, sir; saw nothing of the kind.
Q. You did not have any?
A. No, sir.
Q. Did you know that any of the previous subscribers had received any such indemnity?
A. No, sir.
Q. When did you first know of it?
A. When I was subpœnaed in this case.
Q. When this controversy grew up?
A. Yes, sir.
Q. Within a year or so?
A. Within a few weeks.

Cross-examined:

Q. Do you know what has become of this company?
A. I believe it is in the hands of a receiver.

HENRY G. MARQUAND, called on behalf of defendant, being duly sworn, testified as follows:

105 Q. I show you paper marked Exhibit No. 1, with the words "Thomas Allen, 200 shares, per power of attorney, H. G. Marquand," fourth signature from the bottom; is that your handwriting?
A. Yes, sir.
Q. Do you remember the enterprise, the prospectus being brought to your notice?
A. I do not recollect that paper, though I may have seen it. This matter was brought to me. Mr. Lennox Smith called on me and told me there was a new process. This enterprise was submitted to me and I declined to go in. Mr. Allen was in town and was interested—he lived then in St. Louis—and I spoke to him about it, and I think Mr. Smith had a conversation then with him, and he represented it to him. Mr. Allen turned around to me and I said, I think that is a good thing; it will advance your western interest. He read it over and said he would see about it in a few days. He then charged me when the agreement came in to sign it for him; either he had to go away or was out of town, and he charged me directly to subscribe. I think it was ten thousand dollars or two hundred shares for him. That is all I know about it.
Q. Did you, at the time the matter was brought to your attention—the enterprise—by Mr. Smith or any one else, know of any guarantee being offered to the subscribers of the nature of Exhibit A, which I show you?

106 (Objected to as irrelevant and immaterial; objection overruled; exception taken.)

A. I heard something about a guarantee, whether at that time or later, I do not know. It may have been urged upon him. I cannot say definitely about that. At the first inspection of it there was nothing said about the guarantee itself, but I heard about it.
Q. But when you heard about it you do not know?
A. As regards Allen?
Q. Yes; at the time you made the subscription.
A. I do not know whether he got any guarantee or not.
Q. Did you get any for him?
A. No; not to my knowledge.
Q. You made the subscription—you signed the paper?
A. Yes, sir; he paid for it and attended to all the subsequent details himself.
Q. When you signed his name, Marquand, as attorney, you had not received any such guarantee?
A. No, sir.

Cross-examined:

Q. You do not know whether he got one or not?
A. No, sir; he charged me specifically to sign that paper for him.
Q. That is all you had to do with it?
A. Yes, sir.
Q. You declined to invest on your own account?
A. Yes, sir.

Q. Mr. Allen subsequently paid the subscription?
107 A. He paid all his debts; he was a very particular man.
Q. Was he a relative of yours?
A. He was my brother-in-law; there is no doubt it was paid; he left four or five or six millions; it has been paid without a doubt.

Prospectus and subscription by the plaintiff and others, dated New York, Jan'y 20th, 1873, in the same figures and terms as set out in the plea.

The following abstract from the plaintiff's affidavit of claim filed in the case:

"Plaintiff, being duly sworn according to law, deposes and says that the defendants above named are justly and truly indebted to plaintiff in the sum of $26,282.19, being amounts paid by the plaintiff for 400 shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, with 7 per cent. interest per annum from the dates of the payments by plaintiff made upon said stock. Deponent attaches hereto and makes part hereof exhibit marked 'A,' showing the various payments made by plaintiff on the said stock and the dates thereof and the calculations of interest on the said payments, which he says is true and correct in every particular. Said indebtedness arose as follows: On April 4, 1873, the said defendants executed and delivered to said plaintiffs a certain agreement in the words and figures following, viz:

108 "'Whereas J. Pierpont Morgan has purchased 400 shares of stock of the Blair Iron and Steel Company at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company:

"'Now, we, the undersigned, in consideration of one dollar to us in hand paid, the receipt of which is hereby acknowledged, do hereby agree that if at the end of one year from this date said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him we will purchase the same at that price and pay him the amount paid by him on the same, with interest at the rate of seven per cent. per annum.

"'New York, April 4, 1873.

"'THOMAS S. BLAIR.
"'T. STRUTHERS.'

"And in consideration of the foregoing agreement said plaintiff subscribed for and took and paid for 400 shares of said company's stock, as shown by Exhibit A aforesaid."

W. McKENNAN, [SEAL.]
Cir. Judge.

II. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, defendant having closed his case, the plaintiff, by his counsel, offered to show that the sale of stocks accompanied by a personal guaranty of like character with -at sued on in this case is a prevalent usage and custom pre-
109 vailing in commercial circles in New York city and elsewhere and was at the time that the subscription was made to the stock of Diven, trustee; to which offer of evidence the defendant, by his counsel, made the objection that it was irrelevant and incompetent. The court sustained the objection and excluded the evidence; to which decision of the court plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

III. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause the court, in its charge to the jury, having instructed them that the plaintiff's case standing alone was such as would have entitled him to a verdict, and having further instructed them that the defendant relied for his defence upon the fact, as he alleged and offered evidence to show, that the guaranty given by the defendant to the plaintiff was exceptional, in this, that a similar guaranty was not given to each and all of the co-subscribers with the plaintiff to the stock of the Blair Iron and Steel Company in question, then said: "So, gentlemen of the jury, I instruct you that this case, leaving everything else out of it, turns upon the sufficiency of the proof, in your judgment, as to whether some and not all of the subscribers to this stock were benefited by the ar-
110 rangement which was made with Mr. Morgan, the plaintiff. I will not refer in detail to the evidence upon this point, because * * * If you find that such a special and exceptional arrangement made with Mr. Morgan was not made known to all of the subscribers to the stock, Mr. Morgan had no right to make it, and the law will not enforce it. So, I say again, as you find the facts with regard to that so you will find whether this arrangement is enforcible or not. I repeat, if you find that it was not made known to all of the subscribers to that stock, it can avail Mr. Morgan nothing and cannot be enforced as he seeks to enforce it now. * * * If you find that the beneficial arrangement set up and sought to be enforced in this suit was not made known to all of the subscribers to that stock and they were not afforded an opportunity to avail themselves of like security, as matter of law that arrangement was void, and cannot be enforced, and that is the simple question which I submit to you in this case. If you find that there were any of the subscribers of that stock who were left out and were not afforded the security that Mr. Morgan obtained, the latter cannot avail himself of this arrangement, and your verdict should be for the defendant."

To which portion of the charge of the court plaintiff excepted and

prayed to the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

111 IV. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz :

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, made this offer of evidence, namely, to show by a witness, Philip S. Miller, that he acted in connection with this matter as the agent of Messrs. Blair and Struthers; that he is familiar with the whole transaction relative to the stock subscription that he had testified to; that a guarantee such as was given to the plaintiff in this case was given to all subscribers who asked therefor, and that guarantees were given to subscribers stated in Mr. Blair's deposition as not having received any guarantees, and that guarantees were also given to other parties testified to by defendants as not having received any; that as to the first subscribers upon the list, Messrs. Dickson and Olyphant, they were themselves iron masters, thoroughly familiar with the enterprise personally and by reason of an examination caused to be made at their instance by a distinguished engineer, who reported to them, and that they, the first subscribers, were the parties who introduced the matter to the plaintiff and others and introduced Mr. Blair to the plaintiff and others, and induced the plaintiff and others in part to go into the enterprise—all this for the purpose of showing that there was no fraud in fact nor concealment in connection
112 with the guarantee in suit, and for the purpose of rebuttal and contradiction; to which offer of the plaintiff the defendant, by his counsel, objected; that it was immaterial, irrelevant, and incompetent; and thereupon the court decided, "the plaintiff can show that some of those persons stated not to have gotten guarantees did get them, but the rest of the offer is incompetent. It is not necessary for the defendants to sustain their defence to show actual fraud. If the tendency of such things is to operate as a fraud upon others, that is the basis of the rule, and not that they were actually deceived."

To which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which was done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

V. The court below erred in its ruling, as set out in the bill of exception-, which is as follows, viz :

Upon the trial of the issue in this cause the defendant, by his counsel, requested the court to charge the jury as follows, namely : "That if they find that the agreement sued on of April 4, 1873, was demanded and obtained by the plaintiff from Struthers and Blair as a condition upon which the plaintiffs subscribed for and purchased 400 shares of stock of the Blair Iron and Steel Company; that

the plaintiff was one of a number of persons who were called on to subscribe and did subscribe for the stock of said company, to the amount in the aggregate of six thousand shares, upon the same terms
113 and conditions set forth in the prospectus and contract of subscription, and that others of said subscribers were not informed of the fact that the plaintiff had obtained said agreement of April 4, 1873, as a condition or part of his agreement to subscribe for the said stock, and that the existence of such accompanying agreement was not made known to the others of said common subscribers, then said agreement of April 4, 1873, was, in the eye of the law, a fraud upon the other subscribers who did not receive and were not informed of the existence of such agreement, and was contrary to the policy of the law, and the plaintiff cannot recover." And the court did charge as requested, making answer: "This point is affirmed, and I so instruct you."

To which decision of the court the plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

VI. The court below erred in its ruling, as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"If the jury find from the evidence that the defendant Struthers executed and delivered to the plaintiff the paper in evidence, of date April 4, 1873, and also the subsequent paper, of date March
114 25, 1875, and that on April 4, 1876, plaintiff notified said defendant of his (the plaintiff's) election to sell to the defendant the stock in said papers mentioned and made tender thereof, and that the defendant refused to accept said stock and pay therefor, then their verdict should be for the pl'ff for the amount by him paid for said stock, as shown by the evidence, with interest thereon, as in said original paper specified."

To which point the court answered:

"This point is affirmed, but subject to the effect of the proof introduced by the defendant touching the exceptional engagement made by Struthers and Blair for the purchase of the stock subscribed for by the plaintiff."

To which qualified affirmance plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

VII. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"If the jury find from the evidence that the stock purchased by the plaintiff was stock originally issued by the Blair Iron and Steel Company to the defendant Struthers and Thomas S. Blair and Morrison Foster as full-paid stock, and that these parties, owners
115 thereof, voluntarily agreed that the same, together with other like stock owned by them, should be sold at a minimum price by them named, in part for the benefit of the Blair Iron & Steel Company and in part for their own benefit, and transferred said stock to a trustee, to be by him so sold and accounted for, and that the said stock was so sold by said trustee, then, if the jury find also the facts as set out in the first point, the plaintiff is entitled to recover, whether said stock was sold to all purchasers who paid the minimum price upon the same terms or not."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

VIII. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That unless the jury find from the evidence that the obligations sued on were purposely concealed from the other purchasers of stock from A. S. Diven, trustee, or that any such purchaser desiring a similar obligation was refused the same, they should find for the plaintiff, if they find from the evidence that notice was given and tender made to the defendant Struthers on April 4, 1876, as required by said obligations."

116 Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

IX. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That the execution and delivery to plaintiff of the obligations sued on as a consideration for plaintiff's purchase of four hundred shares of the said stock of the Blair Iron and Steel Company from A. S. Diven, trustee, was not, under the evidence, a fraud in fact and was not a fraud in law."

Which point the court refused; to which decision plaintiff ex-

cepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

X. The court below erred in its ruling as set out in the bill of exception-, which is as follows:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That there is no evidence in this case that the making of the obligations sued — was concealed by the defendants from purchasers of the six thousand shares, or of any portion thereof, of the
117 stock sold by A. S. Diven, trustee."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

XI. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That if the defendants, Struthers and Blair, in consideration that the plaintiff would purchase certain of the stock owned by them and Morrison Foster jointly (and by them voluntarily contributed to be sold by trustee for the mutual benefit of themselves and the Blair Iron and Steel Company), agreed with the plaintiff to repurchase from him, at his option, within a time named, the stock by him bought from the said trustee, said agreement is binding on them, even though no similar agreement was made with other purchasers of said stock from said trustee."

Which point the court refused; to which decision plaintiff excepted and prayed the court to seal this his bill of exceptions, which was done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

XII. The court below erred in its ruling as set out in the bill of exception-, which is as follows, viz:

118 Upon the trial of the issue in this cause, the defendant having closed his case, the plaintiff, by his counsel, submitted the following point:

"That there is no evidence in this case that any of the stockholders of the Blair Iron and Steel Company were in any way defrauded by reason of the execution and delivery of the writings sued on and in evidence, or that any of said stockholders claims to have been so defrauded."

Which point the court refused; to which decision the plaintiff ex-

cepted and prayed the court to seal this his bill of exceptions, which is done accordingly.

W. McKENNAN, [SEAL.]
Cir. Judge.

Indorsed: And now, February 17, 1886, comes John Dalzell, of counsel for plaintiff, and files the within assignments of error on the part of the plaintiff in error, who was also plaintiff below. John Dalzell, of counsel for J. P. Morgan. No. 31. May Term, 1882. Morgan *v.* Struthers. Filed February 17, 1886. H. D. Gamble, clerk.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between J. Pierpont Morgan, a citizen of the State of New York, plaintiff, and Thomas Struthers, a citizen of Penna., impleaded with T. S. Blair, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said supreme court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of December, A. D. 1885.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE, *Clerk.*

Allowed by—
M. W. ACHESON,
U. S. Judge.

[Endorsed:] No. 31. May term, 1882. J. Pierpont Morgan *vs.* Thomas Struthers. Writ of error.

120 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Thomas Struthers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D.

C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein J. Pierpont Morgan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 12th day of December, A. D. 1885.

M. W. ACHESON,
Judge of U. S. Circuit Court.

Service of above citation this day accepted.
Feb. 9th, 1886.

GEORGE SHIRAS, JR.,
D-f-nd-nts' Att'y.

[Endorsed:] No. 31. May term, 1882. J. Pierpont Morgan *vs.* Thomas Struthers. Citation.

121 WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1882.

J. PIERPONT MORGAN
vs. } No. 31.
T. STRUTHERS, Impleaded, &c.

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court at Pittsburgh this 15th day of March, A. D. 1886.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, sitting as judge of the United States circuit court for said district, do hereby certify that H. D. Gamble, above-named, was, at the time of making the above certificate and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, March 15, 1886.

M. W. ACHESON,
Judge U. S. Circuit Court.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 234. J. Pierpont Morgan, plaintiff in error, *vs.* Thomas Struthers. Filed March 17, 1886.

[illegible]

Supreme Court of the United States

[illegible]

No. [illegible]

[illegible]

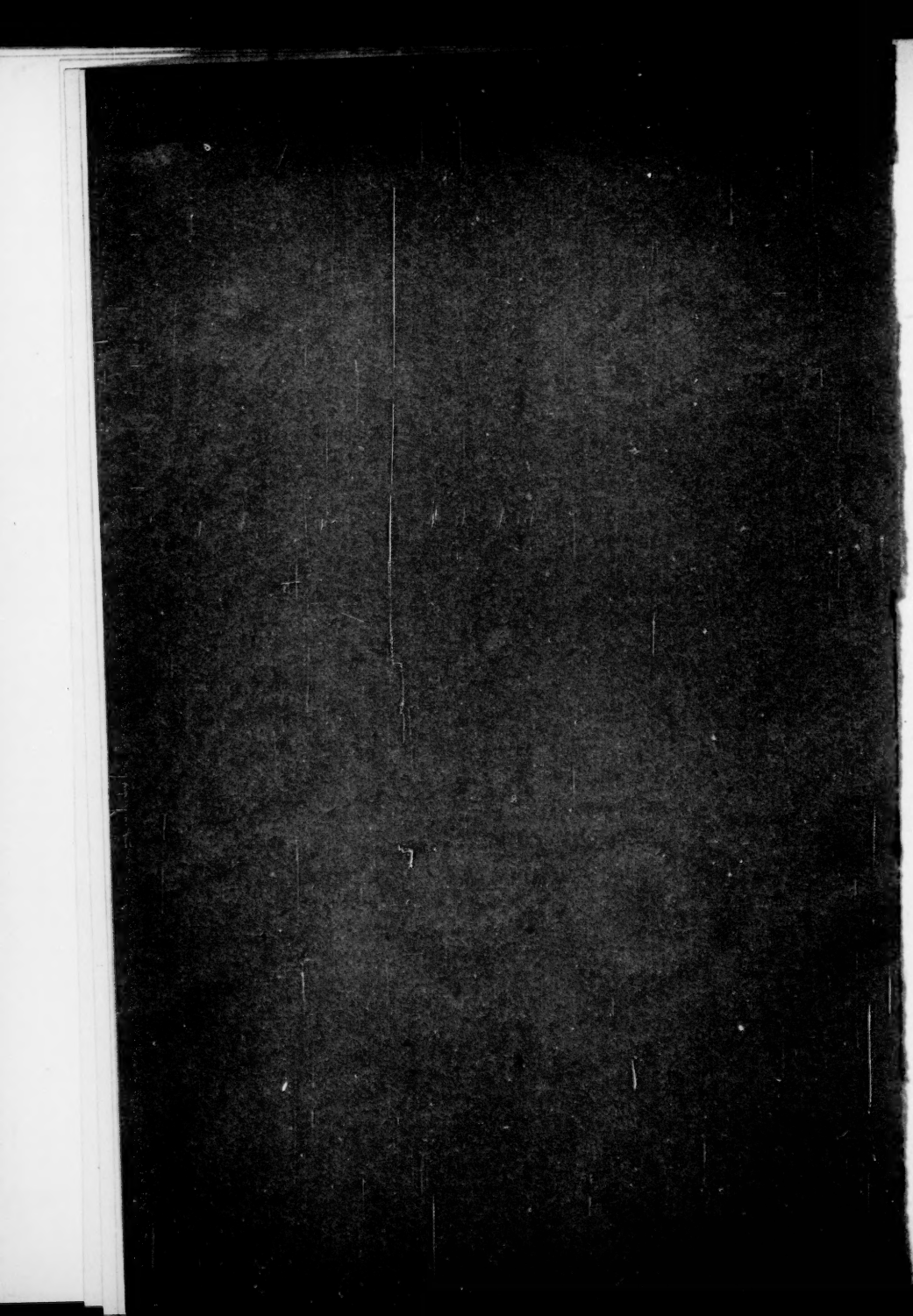
vs.

[illegible]

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

Brief and Argument of Defendants in Error.

R. BROWN,
W. M. LINDSEY,
GEORGE SHIRAS, Jr.,
Counsel for Defendants in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 234.

J. P. MORGAN, Plaintiff in Error,

versus

THOMAS STRUTHERS, Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

ARGUMENT OF DEFENDANT IN ERROR.

The defendant successfully put his case, in the Court below, upon two propositions—first, that the contract sued on was invalid, because made secretly with one of a number of persons who had subscribed together, upon the same express terms and conditions, for stock in a manufacturing corporation, and whereby the plaintiff had sought to secure to himself an advantage withheld from the other subscribers; and, second, that the defendant was not precluded from setting up the invalidity of the contract because he was a party to it.

I.

Blair, Struthers, and Foster, as partners, were owners of certain patents for the manufacture of iron and steel, and for that purpose had erected in the city of Pittsburgh certain

appropriate works. They then procured an incorporation under the laws of the State of New York, in the name of the "Blair Iron and Steel Company," with a capital of $2,500,000, divided into 25,000 shares of $100 each, and which stock, in pursuance of the New York statutes, was paid up in full by a transfer to the company of the said patents and the works at Pittsburgh. The entire amount of the capital stock was issued to Blair, Struthers and Foster, on or about April 12th, 1873. This changed their title as partners to that of corporators, but practically made no change of the property or ownership, every share of the stock belonging to Blair, Struthers and Foster, and no other person or persons having, as yet, acquired any interest therein.

Then, with a view to raise a working capital, Blair, Struthers and Foster issued the following prospectus:

"NEW YORK, January 30, 1873.

"The capital stock of the Blair Iron and Steel Company is 25,000 shares of $100 each, $2,500,000. The capital has been paid up by the transfer of the patents for the Blair process, and the works at Glenwood, Twenty-third Ward of Pittsburgh, Pa., to the company (the deed for the Glenwood property to be made as soon as an empowering Act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure), and the whole stock of said company issued to us therefor.

We have agreed to place in the hands of General A. S. Diven, as Trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the Board of Trustees of said company, excepting $50,000 of the proceeds thereof first to be paid to us by said Trustee.

The Trustees of the company have, with our consent, ordered a sale of 6,000 of said shares, for the purpose of raising a present working capital, and paying said $50,000, the minimum price to be $50 per share. And said trustee, with the approbation of the board of trustees, now offers said 6,000 shares at said minimum price of $50 per share, to be paid for as follows, viz: one-third part thereof as soon as the whole

6,000 shares shall be subscribed for, and the remainder in such installments as the Board of Trustees may call for the same for the purpose of the business, the certificates to be delivered when the whole shall be paid.

THOMAS BLAIR,
T. STRUTHERS,
MORRISON FOSTER,
By his Attorney,
T. STRUTHERS."

At the foot of, and constituting part of the same paper, was the following:

"We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed."

A number of persons subscribed to this paper without any other condition, but Morgan, the plaintiff, demanded and obtained from the promoters of the enterprise a further stipulation or agreement, the existence of which was not made known to others who signed the original paper, some before and some after Morgan, and which additional stipulation or agreement was as follows:

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NEW YORK, April 4, 1873. T. STRUTHERS."

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It is, therefore, entirely clear that the act of subscription for the 6,000 shares of stock was a joint or mutual act, "not to be binding until the whole six thousand shares should be reliably subscribed," and that each and every subscriber had a right to presume that each and every other subscriber was going into the common enterprise upon like terms with himself, namely, the terms set forth in the prospectus and paper signed by all.

The rule for such a case, established by the authorities, absolutely disables every one acting with others in a matter of common interest, from securing to himself any particular profit or advantage over his associates, by any secret or undisclosed agreement or understanding.

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So, too, in *ex parte Sadler and Jackson*, reported in 15 Vesey Jr., 52, where notes of third persons were given as additional security for the payment of a composition, Lord Eldon held the notes to be fraudulent and void, saying: "The deed of composition, speaking the language of all the creditors, not only to the debtors, but to each other, is a common declaration that the securities mentioned in that deed are to be taken in full discharge of their respective debts, * * * * upon principle, then, if two creditors inform a third that upon their view of the justice and humanity of the case, they are willing to take security of the debtor, and not to oppress him by requiring any other person to come under an obligation for payment, can a clearer misrepresentation be stated than that, at the same instant when they are desiring the creditor to take the security of the debtor himself alone, they are procuring the security of other persons for themselves. The principle being that, in such a transaction, all should deal upon equal terms, the creditor ought to be put in a situation that would enable him to require that those persons should become security for him also."

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agree to the composition, unless the debt for which the goods had been seized, were secured to him; C., *who was not a creditor*, guaranteed the debt, and A. withdrew his execution, and seized the composition deed. Held, that the bargain was a fraud upon the rest of the creditors, and void.

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contract with the corporation. * * * The books abound with cases in which the principle is applied that a secret agreement between the parties to a contract, changing its character from what it ostensibly is, to the prejudice of others collaterally interested, is a fraud on them, and therefore void, even as between the parties themselves."

In *Miller vs. Hanover Junction Railroad Co.*, 6 Norris (Pa.) 95, the Court held that a subscription to joint stock is not only an undertaking with the company, but with all the other subscribers, and that a stockholder cannot be permitted to set upon a secret arrangement with the agents of the company, by which he may be released from the subscription, while his fellow subscribers continue to be barred.

So in *Graff vs. Pittsburgh Railroad Co.*, 7th Casey, 334, it was held that "subscription to a joint stock is not only an undertaking to the company, but with all other subscribers."

Robinson vs. P. & C. R. R. Co., 8 Casey, 334, was a case where the Supreme Court of Pennsylvania held that it was no defense to an action to recover the amount of a subscription to stock, that it was made at the request of the president of the company, with the understanding that the defendant was not to pay for or hold the stock subscribed, that such an agreement would be a fraud on the other subscribers.

In *Melvin vs. The Lamar Iron Co.*, 80 Ill. 446, it was held by the Supreme Court of Illinois, that a subscription to the capital stock of a corporation, coupled with a right under a separate contract, to surrender the certificate and get the money back, is a fraud upon the other subscribers, and such separate agreement will be treated as void.

In *Blodgett vs. Merrill*, 20 Vt. 509, and *Railroad Co. vs. Bailey*, 24 Vt. 466, it was held that parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of the subscription, are inoperative and void, as a fraud upon the other subscribers.

In *Hodge vs. Twitchell*, 33 Minnesota Reports, 389, it was held that where a number of persons went into a joint enterprise to buy and sell lands, a secret agreement made by one

of them with the vendor, whereby he was to have an individual advantage, was void, as a fraud upon the others.

The Supreme Court of Massachusetts, in *Stevenberg vs. Bowman*, 103 Mass., 325, held that promissory notes given by a debtor to his creditor for twice the amount really due, for the purpose of enabling that creditor to obtain a large dividend under a composition deed between the debtor and all his creditors, were void.

And *Fay vs. Fay*, 121 Mass. Rpts., 561, was a case where a note given to one of a number of creditors who were acting together, was held void as a fraud upon the others.

In *Lee vs. Sellers*, 32 P. F. Smith, 473, it was held by the Supreme Court of Pennsylvania, that a contract secretly given by a third person to one of a number of creditors, in consideration that he would sign a composition deed, was void as a fraud against the other creditors.

Getty vs. Devlin, 54 N. Y., 403, was a case where several persons were engaged in a joint enterprise for their mutual benefit, and it was held that each has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one of them will be permitted to take to himself a secret and separate advantage; and where one, unknown to his associates, causes to be transferred to the association property previously purchased by him, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made.

See the same case, further considered, in 70 N. Y., 504.

To these cases, and many others of like purport that might be cited, the plaintiff apparently makes no reply, except to deny that they correctly state the law. He, indeed, does cite the case of *Meyer vs. Blair and Struthers*, 109 N. Y. Rpts., 600, and this case he claims would, if cited, have bound the Court below, and, being cited, binds this Court. The reason why it binds this Court is supposed to be that it is a construction by the New York Court of a contract in like terms with that which is the subject of the present suit. But it is not necessary to cite decisions to show that this is not a case in

which the Federal Courts are bound by the decisions of a State Court. The decision of the Court of Appeals of New York would have been entitled to receive in the Court below, and is entitled to now receive at the hands of this Court, just that degree of weight to which the reasoning of the Court entitles it. In his opinion, reversing that of the Supreme Court at a General Term, Judge Andrews gives two reasons, or points to two facts, which he thinks distinguishes a case like the present from those cited, in connection with subscription to stock in corporations and deeds of composition by a number of creditors.

He says, with respect to the latter class of cases, that "where the composition provides for giving credit to the debtor for the amount to be paid on the composition, such secret agreements take, or may take, from him the very means to meet the composition engagements"—thus implying that the ground of those decisions was that the secret agreement sought to withdraw from the fund to which the creditors had a right to look. But an examination of the cases will show that such was not the reason upon which they went.

In the leading case of *Jackman vs. Mitchell*, 13 Vesey, Jr., the secret agreement that was held void was a bond of a third person, which in no way bound either the debtor, nor affected the common fund.

So, *ex parte Sadler & Jackman*, 15 Vesey Jr., 52, the notes held void were those of third persons, which did not bind the debtor, nor diminish the common fund.

Sellers vs. Lee, 32 P. F. Smith, 473, was a case where the note held void was not only the note of a third person, but it was the note of a creditor who signed the deed of composition and discharged the debtor from all the liability to him. The same is true of *Liecester vs. Rose*, 4 East, 372.

In all these cases, the creditors received everything that the composition deed conferred upon them, and there was no impairment, as Judge Andrews seems to suppose, of the common fund provided for their payment. Those decisions go upon a broader principle—that where creditors in general have bar-

gained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security for himself.

The second reason given by Judge Andrews, as distinguishing the case before him from those cited, was that the secret agreement was not made with the company, but was made with Blair and Struthers, promoters of the company, and the principal holders of its stock. From this the learned Judge seems to infer, that because the plaintiff had paid and the company had received the amount of the former's subscription, that was all the other subscribers had a right to expect, and that the additional and private agreement did not concern them.

This, again, is an imperfect view of the subject, and overlooks the real foundation of the rule.

The other subscribers had a right to presume that Mr. Morgan went into the common enterprise upon the same terms with themselves. Many of them may have been chiefly induced to subscribe by a knowledge that so prominent and successful an operator was willing to risk his money in such an adventure. Had they been told that he had exacted a private security or guaranty which availed to give him the benefit of both the experiment in business and of getting back his money with interest, if it did not succeed, they would assuredly either have refused to subscribe or have demanded a similar guaranty. Moreover they had a right to suppose that the new firm was to have the countenance of Mr. Morgan, and, probably, of his assistance in the future. Certainly they had a right to expect that Blair and Struthers would aid the project by every means in their power, and not be depleted of their funds by their co-subscribers.

That the object of this private contract was to give Morgan the advantage of testing the value of the Blair and Struthers' patents before being finally bound is clearly seen, as well from the fact that the one contract was made at the same time with, and in consideration of, the other, as from the fact that this private contract was renewed two or three times, while the experiment was going on.

The same fallacy runs through the argument on behalf of the plaintiff in error, viz: That because the company was not a party to the secret contract, the other subscribers can have nothing to complain of. As we have seen, the leading cases cited were, in most instances, cases where the collateral contract was that of a third person, and left the original contract, in form, undisturbed.

Of course, any supposed distinction between the case of a direct subscription for stock in a company and a subscription to take a portion of paid up stock, for the purpose of supplying a working fund, is entirely an empty one. Good faith, as between themselves, is just as important where the joint or common action is in subscribing for a block of paid up stock, as in subscribing directly for stock of the company. The cases cited show that the principle, forbidding a secret advantage, is not confined to the case of a subscription for original stock in a corporation, or to the case of an agreement to discharge a debtor, but embraces all cases of buying lands or stocks, and other cases of common action. Whether Morgan and his associates subscribed for stock in the Blair Iron & Steel Company by an original subscription, or subscribed, by a mutual arrangement, for a block of stock offered by the promoters of the company, makes no difference. In either case, the policy of the law forbids one of such subscribers, whose act of subscription is held out as an inducement for others to subscribe, from demanding and enforcing a private stipulation in his own favor.

II.

The next proposition relied upon by the plaintiff in error is that, even if the agreement sued on were fraudulent as to third parties, it is still valid and enforceable as between the parties to the agreement itself.

Nearly all of the cases heretofore cited as authority for the proposition that such secret contracts are, in their nature, frauds as respects associates in the common enterprise, are likewise authority to show that such fraudulent contracts are invalid and not enforceable as between the parties themselves.

Coleman vs. Waller, 3 G. & J. 212, was a suit on a bond given by defendant, a third party, to secure a creditor, and because this was not made known to all the other creditors at the time, the Court ordered a non-suit to be entered. Such was the case of *Jackson vs. Mitchell*, 13 Vesey Jr., 581, and in *ex parte Sadler and Jackson*, 15 Vesey, and *Liscester vs. Rose*, 4 East, the same defense was held good in favor of the defendants, parties to the contracts sued on.

In *Lee vs. Sellers*, 32 P. F. Smith, and *Stevenberg vs. Bowman*, 103 Mass 325, and *Fay vs. Fay*, 121 Mass. Reports, an application of the principle above contended for, was successfully contended for on behalf of defendants, who were parties to the illicit agreements.

The rule contended for by the plaintiff in error, that the defendant cannot be heard to allege the fraud, has no application to this case. The same ground was taken in the foregoing cases, but in vain. In *Jackson vs. Mitchell*, the party who gave the bond sustained his bill to have the bond cancelled—he was not merely defending an action on it.

It is true that if the money had been actually paid to the plaintiff, an action might not lie to recover it, the contract having been fully executed. [Still, some of the adjudged cases go even to that extent, see *Bean vs. Ainsink*, 12 Amer. Law Reg. (N. S.) 379, and cases cited in note.] But it is very different where one of the parties to the fraudulent contract comes into Court to enforce it. In such a case the maxim, "*in pari delicto, potior est conditio defendentis*," applies with full force.

"It is a maxim of law that '*ex turpi causa non oritur actio*,' and therefore if a contract of such a character be made, its invalidity will be a defense at law whilst it remains unexecuted—such, for instance, are contracts for purposes which, though not strictly illegal, are against the policy of the law."

Adams' Equity, 174.

"There is a class of cases where the parties to a fraudulent, or even an illegal, contract, have fully executed it themselves, in which Courts of Justice will not interfere to unravel their

doings, but a contract that remains to be executed, which stands in need of a judgment of a Court of Justice to enable a party to reap its fruits, and which is successfully impeached as covinous and fraudulent in part, is easily distinguished from all such cases (executed contracts) and rests on a foundation of sand."

Miller's Appeal, 6 Casey 478.

The Supreme Court of the United States has recognized this doctrine in numerous cases.

"The law will not enforce a secret agreement made by the plaintiff, in an action where all are liable, with certain of the defendants that if *they* will desist from resistance to his suit, he will, if he recovers judgment, not levy execution on *their* property."

Selz vs. Unna, 6 Wallace 327.

Tool Company vs. Norris, 2 Wallace, 45, was a suit to recover on an agreement for compensation for procuring from the Government a right to furnish its supplies, and the ground of defense was that an agreement of the character stated is against public policy and void, and this was sustained by the Supreme Court in favor of the defendant, a party to the illicit agreement. *Maguire vs. Corwine*, 101 W. S. 108, was a suit wherein, in consideration of A's procuring B's appointment as special counsel in certain causes against the United States, B agrees that he will pay A one-half of the fee which he may receive from the Government, and it was held, in favor of the defendant, B, party to said agreement, that the contract was contrary to public policy, and void—citing *Trist vs. Child*, 21 Wallace, 448, where a contract to perform lobby service was held void as against public policy, and the promissor was permitted to set up the defense, although the services stipulated for had been performed.

In *Orcanyan vs. Arms Company*, 103 U. S. 24, where it was shown that the consideration of the contract sued on was an agreement, on the part of a consul of a foreign government, to use his influence in favor of a manufacturing company here with an agent of that government sent to examine

and report in regard to the purchase of arms for it, it was held that such contract was against public policy and void. *Coppell vs. Hall*, 7 Wallace, 542, was the case of a contract made by the consul of a neutral power, with a citizen of a belligerent State, to protect with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines. Such contract was held void, and in reply to the contention that the defendant, as a party to an illegal agreement, could not be heard to assert such illegality, this Court said: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as scarcely worth refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. * * * The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

III.

The assignments avering error in the rejection of evidence are faintly urged, and scarcely seem to demand notice.

A custom in Wall street to make secret agreements in fraud of associates in a common contract, would, of course, be a bad custom, and cannot be shown. If, indeed, such practices do prevail, there is the greater necessity that they should receive the condemnation of the Courts.

Nor would it avail the plaintiff to show that some of the other participants in this contract of subscription received similar contracts of guaranty or re-purchase, because the fact remained undisputed that some who subscribed before, and some who subscribed after the plaintiff, did not receive such contracts, and did not know of their existence.

R. Brown,
W. M. Lindsey,
George Shiras, Jr.,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 254.

J. P. MORGAN, Plaintiff in Error,

vs.

THOMAS STRUTHERS, Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

Brief and Argument of Defendant in Error.

R. BROWN,
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Counsel for Defendant in Error.

IN THE

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OCTOBER TERM, 1888.

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versus

THOMAS STRUTHERS, Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

ARGUMENT OF DEFENDANT IN ERROR.

The defendant successfully put his case, in the Court below, upon two propositions—first, that the contract sued on was invalid, because made secretly with one of a number of persons who had subscribed together, upon the same express terms and conditions, for stock in a manufacturing corporation, and whereby the plaintiff had sought to secure to himself an advantage withheld from the other subscribers; and, second, that the defendant was not precluded from setting up the invalidity of the contract because he was a party to it.

I.

Blair, Struthers, and Foster, as partners, were owners of certain patents for the manufacture of iron and steel, and for that purpose had erected in the city of Pittsburgh certain

appropriate works. They then procured an incorporation under the laws of the State of New York, in the name of the "Blair Iron and Steel Company," with a capital of $2,500,000, divided into 25,000 shares of $100 each, and which stock, in pursuance of the New York statutes, was paid up in full by a transfer to the company of the said patents and the works at Pittsburgh. The entire amount of the capital stock was issued to Blair, Struthers and Foster, on or about April 12th, 1873. This changed their title as partners to that of corporators, but practically made no change of the property or ownership, every share of the stock belonging to Blair, Struthers and Foster, and no other person or persons having, as yet, acquired any interest therein.

Then, with a view to raise a working capital, Blair, Struthers and Foster issued the following prospectus:

"NEW YORK, January 30, 1873.

"The capital stock of the Blair Iron and Steel Company is 25,000 shares of $100 each, $2,500,000. The capital has been paid up by the transfer of the patents for the Blair process, and the works at Glenwood, Twenty-third Ward of Pittsburgh, Pa., to the company (the deed for the Glenwood property to be made as soon as an empowering Act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure), and the whole stock of said company issued to us therefor.

We have agreed to place in the hands of General A. S. Diven, as Trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the Board of Trustees of said company, excepting $50,000 of the proceeds thereof first to be paid to us by said Trustee.

The Trustees of the company have, with our consent, ordered a sale of 6,000 of said shares, for the purpose of raising a present working capital, and paying said $50,000, the minimum price to be $50 per share. And said trustee, with the approbation of the board of trustees, now offers said 6,000 shares at said minimum price of $50 per share, to be paid for as follows, viz: one-third part thereof as soon as the whole

6,000 shares shall be subscribed for, and the remainder in such installments as the Board of Trustees may call for the same for the purpose of the business, the certificates to be delivered when the whole shall be paid.

THOMAS BLAIR,
T. STRUTHERS,
MORRISON FOSTER,
By his Attorney,
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At the foot of, and constituting part of the same paper, was the following:

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agree to the composition, unless the debt for which the goods had been seized, were secured to him; C., *who was not a creditor*, guaranteed the debt, and A. withdrew his execution, and seized the composition deed. Held, that the bargain was a fraud upon the rest of the creditors, and void.

In the case of *White Mountain Railroad Co. vs. Easterman*, 34 New Hamp. 124, it was held that a secret agreement entered into between the directors of a railroad corporation and a subscriber for shares in its capital stock, that he may, within a specified time, reduce the number of shares thus subscribed for, the subscription being held out for the full amount, in order to induce others to subscribe, is void, as a fraud upon the other subscribers. Judge Sawyer, in delivering the opinion of the Court, says: "It is the secret stipulation alone which operates in fraud of others, and upon that the law leaves the parties where they stand, declining to enforce it for the benefit of others, while, as to the other part of the contract, to enforce it between the parties is what is necessary to defeat their fraudulent purpose as to other innocent persons. That the proceeding was a fraud upon third persons is clear from the relation in which subscribers for stock in a corporation of this kind stand toward each other. In the subscription of each person, every other subscriber has a direct interest. Their respective subscriptions are contributions or advancements for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be. The fact that one man has bound himself to place a certain amount of his money upon the risk involved in the enterprise, is an inducement to others to venture in like manner. Seeing who are his associates, and the extent of the liability which they have assumed, he regulates his own upon that consideration; and though in form and legal effect the contract of each is with the corporation, yet among the subscribers themselves it is to be regarded as an agreement with every other subscriber, to bear that proportion of the common burthen to which he purposes to bind himself, by the contract which he holds out to them, as his

contract with the corporation. * * * The books abound with cases in which the principle is applied that a secret agreement between the parties to a contract, changing its character from what it ostensibly is, to the prejudice of others collaterally interested, is a fraud on them, and therefore void, even as between the parties themselves."

In *Miller vs. Hanover Junction Railroad Co.*, 6 Norris (Pa.) 95, the Court held that a subscription to joint stock is not only an undertaking with the company, but with all the other subscribers, and that a stockholder cannot be permitted to set upon a secret arrangement with the agents of the company, by which he may be released from the subscription, while his fellow subscribers continue to be barred.

So in *Graff vs. Pittsburgh Railroad Co.*, 7th Casey, 334, it was held that "subscription to a joint stock is not only an undertaking to the company, but with all other subscribers."

Robinson vs. P. & C. R. R. Co., 8 Casey, 334, was a case where the Supreme Court of Pennsylvania held that it was no defense to an action to recover the amount of a subscription to stock, that it was made at the request of the president of the company, with the understanding that the defendant was not to pay for or hold the stock subscribed, that such an agreement would be a fraud on the other subscribers.

In *Melvin vs. The Lamar Iron Co.*, 80 Ill. 446, it was held by the Supreme Court of Illinois, that a subscription to the capital stock of a corporation, coupled with a right under a separate contract, to surrender the certificate and get the money back, is a fraud upon the other subscribers, and such separate agreement will be treated as void.

In *Blodgett vs. Merrill*, 20 Vt. 509, and *Railroad Co. vs. Bailey*, 24 Vt. 466, it was held that parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of the subscription, are inoperative and void, as a fraud upon the other subscribers.

In *Hodge vs. Twitchell*, 33 Minnesota Reports, 389, it was held that where a number of persons went into a joint enterprise to buy and sell lands, a secret agreement made by one

of them with the vendor, whereby he was to have an individual advantage, was void, as a fraud upon the others.

The Supreme Court of Massachusetts, in *Stevenberg vs. Bowman*, 103 Mass., 325, held that promissory notes given by a debtor to his creditor for twice the amount really due, for the purpose of enabling that creditor to obtain a large dividend under a composition deed between the debtor and all his creditors, were void.

And *Fay vs. Fay*, 121 Mass. Rpts., 561, was a case where a note given to one of a number of creditors who were acting together, was held void as a fraud upon the others.

In *Lee vs. Sellers*, 32 P. F. Smith, 473, it was held by the Supreme Court of Pennsylvania, that a contract secretly given by a third person to one of a number of creditors, in consideration that he would sign a composition deed, was void as a fraud against the other creditors.

Getty vs. Devlin, 54 N. Y., 403, was a case where several persons were engaged in a joint enterprise for their mutual benefit, and it was held that each has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one of them will be permitted to take to himself a secret and separate advantage; and where one, unknown to his associates, causes to be transferred to the association property previously purchased by him, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made.

See the same case, further considered, in 70 N. Y., 504.

To these cases, and many others of like purport that might be cited, the plaintiff apparently makes no reply, except to deny that they correctly state the law. He, indeed, does cite the case of *Meyer vs. Blair and Struthers*, 109 N. Y. Rpts., 600, and this case he claims would, if cited, have bound the Court below, and, being cited, binds this Court. The reason why it binds this Court is supposed to be that it is a construction by the New York Court of a contract in like terms with that which is the subject of the present suit. But it is not necessary to cite decisions to show that this is not a case in

which the Federal Courts are bound by the decisions of a State Court. The decision of the Court of Appeals of New York would have been entitled to receive in the Court below, and is entitled to now receive at the hands of this Court, just that degree of weight to which the reasoning of the Court entitles it. In his opinion, reversing that of the Supreme Court at a General Term, Judge Andrews gives two reasons, or points to two facts, which he thinks distinguishes a case like the present from those cited, in connection with subscription to stock in corporations and deeds of composition by a number of creditors.

He says, with respect to the latter class of cases, that "where the composition provides for giving credit to the debtor for the amount to be paid on the composition, such secret agreements take, or may take, from him the very means to meet the composition engagements"—thus implying that the ground of those decisions was that the secret agreement sought to withdraw from the fund to which the creditors had a right to look. But an examination of the cases will show that such was not the reason upon which they went.

In the leading case of *Jackman vs. Mitchell*, 13 Vesey, Jr., the secret agreement that was held void was a bond of a third person, which in no way bound either the debtor, nor affected the common fund.

So, *ex parte Sadler & Jackman*, 15 Vesey Jr., 52, the notes held void were those of third persons, which did not bind the debtor, nor diminish the common fund.

Sellers vs. Lee, 32 P. F. Smith, 473, was a case where the note held void was not only the note of a third person, but it was the note of a creditor who signed the deed of composition and discharged the debtor from all the liability to him. The same is true of *Liecester vs. Rose*, 4 East, 372.

In all these cases, the creditors received everything that the composition deed conferred upon them, and there was no impairment, as Judge Andrews seems to suppose, of the common fund provided for their payment. Those decisions go upon a broader principle—that where creditors in general have bar-

gained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security for himself.

The second reason given by Judge Andrews, as distinguishing the case before him from those cited, was that the secret agreement was not made with the company, but was made with Blair and Struthers, promoters of the company, and the principal holders of its stock. From this the learned Judge seems to infer, that because the plaintiff had paid and the company had received the amount of the former's subscription, that was all the other subscribers had a right to expect, and that the additional and private agreement did not concern them.

This, again, is an imperfect view of the subject, and overlooks the real foundation of the rule.

The other subscribers had a right to presume that Mr. Morgan went into the common enterprise upon the same terms with themselves. Many of them may have been chiefly induced to subscribe by a knowledge that so prominent and successful an operator was willing to risk his money in such an adventure. Had they been told that he had exacted a private security or guaranty which availed to give him the benefit of both the experiment in business and of getting back his money with interest, if it did not succeed, they would assuredly either have refused to subscribe or have demanded a similar guaranty. Moreover they had a right to suppose that the new firm was to have the countenance of Mr. Morgan, and, probably, of his assistance in the future. Certainly they had a right to expect that Blair and Struthers would aid the project by every means in their power, and not be depleted of their funds by their co-subscribers.

That the object of this private contract was to give Morgan the advantage of testing the value of the Blair and Struthers' patents before being finally bound is clearly seen, as well from the fact that the one contract was made at the same time with, and in consideration of, the other, as from the fact that this private contract was renewed two or three times, while the experiment was going on.

The same fallacy runs through the argument on behalf of the plaintiff in error, viz: That because the company was not a party to the secret contract, the other subscribers can have nothing to complain of. As we have seen, the leading cases cited were, in most instances, cases where the collateral contract was that of a third person, and left the original contract, in form, undisturbed.

Of course, any supposed distinction between the case of a direct subscription for stock in a company and a subscription to take a portion of paid up stock, for the purpose of supplying a working fund, is entirely an empty one. Good faith, as between themselves, is just as important where the joint or common action is in subscribing for a block of paid up stock, as in subscribing directly for stock of the company. The cases cited show that the principle, forbidding a secret advantage, is not confined to the case of a subscription for original stock in a corporation, or to the case of an agreement to discharge a debtor, but embraces all cases of buying lands or stocks, and other cases of common action. Whether Morgan and his associates subscribed for stock in the Blair Iron & Steel Company by an original subscription, or subscribed, by a mutual arrangement, for a block of stock offered by the promoters of the company, makes no difference. In either case, the policy of the law forbids one of such subscribers, whose act of subscription is held out as an inducement for others to subscribe, from demanding and enforcing a private stipulation in his own favor.

II.

The next proposition relied upon by the plaintiff in error is that, even if the agreement sued on were fraudulent as to third parties, it is still valid and enforceable as between the parties to the agreement itself.

Nearly all of the cases heretofore cited as authority for the proposition that such secret contracts are, in their nature, frauds as respects associates in the common enterprise, are likewise authority to show that such fraudulent contracts are invalid and not enforceable as between the parties themselves.

Coleman vs. Waller, 3 G. & J. 212, was a suit on a bond given by defendant, a third party, to secure a creditor, and because this was not made known to all the other creditors at the time, the Court ordered a non-suit to be entered. Such was the case of *Jackson vs. Mitchell*, 13 Vesey Jr., 581, and in *ex parte Sadler and Jackson*, 15 Vesey, and *Liscester vs. Rose*, 4 East, the same defense was held good in favor of the defendants, parties to the contracts sued on.

In *Lee vs. Sellers*, 32 P. F. Smith, and *Stevenberg vs. Bowman*, 103 Mass 325, and *Fay vs. Fay*, 121 Mass. Reports, an application of the principle above contended for, was successfully contended for on behalf of defendants, who were parties to the illicit agreements.

The rule contended for by the plaintiff in error, that the defendant cannot be heard to allege the fraud, has no application to this case. The same ground was taken in the foregoing cases, but in vain. In *Jackson vs. Mitchell*, the party who gave the bond sustained his bill to have the bond cancelled—he was not merely defending an action on it.

It is true that if the money had been actually paid to the plaintiff, an action might not lie to recover it, the contract having been fully executed. [Still, some of the adjudged cases go even to that extent, see *Bean vs. Ainsink*, 12 Amer. Law Reg. (N. S.) 379, and cases cited in note.] But it is very different where one of the parties to the fraudulent contract comes into Court to enforce it. In such a case the maxim, "*in pari delicto, potior est conditio defendentis*," applies with full force.

"It is a maxim of law that '*ex turpi causa non oritur actio*,' and therefore if a contract of such a character be made, its invalidity will be a defense at law whilst it remains unexecuted—such, for instance, are contracts for purposes which, though not strictly illegal, are against the policy of the law."

Adams' Equity, 174.

"There is a class of cases where the parties to a fraudulent, or even an illegal, contract, have fully executed it themselves, in which Courts of Justice will not interfere to unravel their

doings, but a contract that remains to be executed, which stands in need of a judgment of a Court of Justice to enable a party to reap its fruits, and which is successfully impeached as covinous and fraudulent in part, is easily distinguished from all such cases (executed contracts) and rests on a foundation of sand."

Miller's Appeal, 6 Casey 478.

The Supreme Court of the United States has recognized this doctrine in numerous cases.

"The law will not enforce a secret agreement made by the plaintiff, in an action where all are liable, with certain of the defendants that if *they* will desist from resistance to his suit, he will, if he recovers judgment, not levy execution on *their* property."

Selz vs. Unna, 6 Wallace 327.

Tool Company vs. Norris, 2 Wallace, 45, was a suit to recover on an agreement for compensation for procuring from the Government a right to furnish its supplies, and the ground of defense was that an agreement of the character stated is against public policy and void, and this was sustained by the Supreme Court in favor of the defendant, a party to the illicit agreement. *Maguire vs. Corwine*, 101 W. S. 108, was a suit wherein, in consideration of A's procuring B's appointment as special counsel in certain causes against the United States, B agrees that he will pay A one-half of the fee which he may receive from the Government, and it was held, in favor of the defendant, B, party to said agreement, that the contract was contrary to public policy, and void—citing *Trist vs. Child*, 21 Wallace, 448, where a contract to perform lobby service was held void as against public policy, and the promissor was permitted to set up the defense, although the services stipulated for had been performed.

In *Oreanyan vs. Arms Company*, 103 U. S. 24, where it was shown that the consideration of the contract sued on was an agreement, on the part of a consul of a foreign government, to use his influence in favor of a manufacturing company here with an agent of that government sent to examine